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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 14

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WALDEMAR R. HELMHOLTZ, AS SOLE DEVISEE AND LEGATEE UNDER THE WILL OF IRENE C. HELMHOLZ, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 30, 1935

CERTIORARI GRANTED APRIL 29, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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Before United States Board of Tax Appeals

Docket No. 50485

WALDEMAR R. HELMHOLZ, AS SOLE DEVISEE AND LEGATEE UNDER the Will of Irene C. Helmholz, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For taxpayer: James Quarles, Esq.
For Comm'r: Lewis S. Pendleton, Esq.

Docket entries

1930
Oct. 25—Petition received and filed. Taxpayer notified. (Fee paid.)
" 27—Copy of petition served on general counsel.
Dec. 12—Answer filed by general counsel.
1931
Jan. 10—Copy of answer served on taxpayer. Assigned to General Calendar.
1932
Sep. 23—Hearing set Oct. 31, 1932.
Oct. 11—Motion for continuance filed by taxpayer. 10/13/32 granted to Dec. 8, 1932.
" 25—Application for order to take depositions filed by taxpayer.
" 25—Application for subpoena filed by taxpayer.
Nov. 2—Stipulation of facts filed.
" 3—Order to take depositions of F. W. Rogers and John Bannen, entered.
" 4—Subpoena issued—F. W. Rogers and John Bannen.
" 19—Depositions filed. (3) 11/21/32 copy served.
Dec. 8—Hearing had before Mr. Smith, Div. 5. Submitted. Briefs due 30 days from date. Depositions of John Bannen and F. W. Rogers filed.
" 14—Transcript of hearing of Dec. 8, 1932, filed.
1933
Jan. 4—Motion for 30 days extension to file brief filed by general counsel. 1/5/33 granted to 2/1/33 for both sides.
" 7—Brief filed by taxpayer.
Feb. 1—Brief filed by general counsel.
May 23—Findings of fact and opinion rendered, Mr. Smith. Judgment will be entered under rule 50.
Jun. 10—Motion for reconsideration and review by the Board filed be general counsel.
" 17—Hearing set July 12, 1933, on motion.
Jul. 12—Hearing had before Mr. Seawell on motion for review by Board—continued to 8/23/33.
" 12—Order of continuance to Aug. 23, 1933, entered.

Aug. 16—Order to place on General Calendar for hearing after Sept. 1, 1933, entered.
" 29—Notice of hearing on Sept. 5, 1933 on motion for reconsideration and review.

1933

Sep. 5—Hearing had before Mr. Smith, Div. 5, on Commissioner's motion for reconsideration and review. Petitioner's brief filed at hearing.

1933

Sept. 9—Transcript of hearing of Sept. 5, 1933, filed.
Sept. 27—Order denying motion for reconsideration entered.
Oct. 26—Notice of settlement filed by general counsel.
" 30—Decision entered, Mr. Smith, Div. 5.

1934

Jan. 19—Stipulation of venue filed.
" 20—Petition for review by Court of Appeals of D. C. with assignments of error filed by general counsel.
" 24—Proof of service filed on attorney for taxpayer.
Feb. 6—Proof of service on taxpayer filed by general counsel.
Mar. 14—Motion for extension to 4/30/34 to complete record filed by general counsel.
" 14—Order enlarging time to April 30, 1934, for preparation of evidence and delivery of record entered.
" 24—Agreed statement of evidence lodged.
" 24—Praecipe filed—proof of service thereon.
" 26—Agreed statement of evidence approved and ordered filed.

3 [File endorsement omitted.]

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed October 25, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, dated September 24, 1930, and bearing the caption—

MT-ET-Cl-2331-CW.
District of Wisconsin.
Estate of Irene C. Helmholz.
Date of death, October 19, 1927,

and as a basis of his proceeding alleges as follows:

1. The petitioner was formerly, and at the commencement of the proceeding resulting in the assessment by the respondent of the deficiency tax herein complained of, the administrator with the will annexed (not executor, as inadvertently stated in previous proceedings herein) of the estate of said Irene C. Helmholz, deceased, but

he has since made a final settlement of his accounts as such administrator in the county court of Milwaukee County, Wisconsin, which court was the court having jurisdiction in the premises, and by an order and judgment duly made and entered by said court on the ..... day of September, 1928, the said settlement was duly approved by said court, and the petitioner was by appropriate order of said court duly discharged as said administrator. However, the petitioner was and is the sole beneficiary under the will of said Irene C. Helmholz, and it is in that capacity he prosecutes this appeal.

The petitioner formerly resided in the village of Shorewood, Milwaukee County, Wisconsin, and his business address during that time was care Helmholz Shoe Manufacturing Company, Cudahy, Wisconsin, but he now resides at 201 Beacon Street, South Pasadena, California.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioner on September 24, 1930.

3. The taxes in controversy are estate taxes for the calendar year 1927, being, as determined by the respondent, a deficiency in said taxes in the amount of $13,267.34, which sum, after deducting therefrom $10,613.87 found by the respondent to be applicable as a credit on said claimed deficiency on account of inheritance taxes heretofore paid by the petitioner to the State of Wisconsin, leaves $2,653.47 as the net amount of deficiency assessed by the respondent against the estate of said Irene C. Helmholz, deceased.

4. 4. The determination of the tax set forth in the said notice of deficiency is based upon the following, which the petitioner alleges to have been error on the part of the respondent:

(1) Stocks and bonds:

One Share common stock in the Patrick Cudahy Family Company.

Returned at $240.00.

Determined by the respondent at $320.00.

The petitioner alleges that the original return of said one share of stock at $240 was by mistake, and that, because of certain restrictions upon the transfer of stock in said company, and because no dividends have been declared on said stock since the death of said decedent, the fair market value of said one share at the time of the decedent's death was $100, and no more.

(2) Transfers:

999 Shares common stock in the Patrick Cudahy Family Company, transferred by the decedent to a trustee by indenture dated June 7, 1918, income payable to decedent for life with power to appoint by will.

Returned at zero.

Determined by the respondent at $319,680.00.

Respecting said determination the petitioner alleges:

(a) That, in assuming to treat the taxability of said transfer as governed by the provisions of subsections (c) and (d) of section

302 of the Revenue Act of 1926, whereas, as the petitioner believes and alleges, said question of liability is governed solely by the provisions of subsection (f) of said section 302, the respondent erred;

(b) That said transfer is not subject to an estate tax under the Revenue Act of 1926, and that the respondent erred in determining that it was so subject;

(c) That, if subject at all to such tax, the respondent erred in his said finding and determination of the fair market value of said stock; and

(d) That, if subject at all to such tax, the respondent further erred in his determination that he transfer of the full title to and ownership of said 999 shares, that is to say, the corpus of the trust, instead of merely a beneficial life interest in said shares, was taxable.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) The decedent, Irene C. Helmholz, was the daughter of the late Patrick Cudahy and the wife of the petitioner. At the time of her death, and for many years prior thereto, she resided in Milwaukee County, Wisconsin.

(2) By a trust indenture dated June 7, 1918, Irene C. Helmholz transferred 999 shares of the capital stock of the Patrick Cudahy Family Company to a trustee. Her father and mother and brothers and sisters were also parties to the trust agreement and made similar transfers of the same stock.

Said trust indenture provided that the trustee should receive all dividends paid on the 999 shares of stock so transferred to it, and that it should, after deducting expenses of administration, distribute the net amount of such dividends

(a) To Irene C. Helmholz as long as she lived;

(b) Upon the death of said Irene C. Helmholz to her appointee by last will and testament for life; and

(c) Upon the death of such appointee to the issue of said Irene C. Helmholz.

The indenture further provided that the primary trust should terminate.

(a) Upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy; or

(b) Upon the delivery to the trustee of a writing signed by all of the then beneficiaries, other than testamentary appointees, declaring the trust at an end; or

(c) Upon the delivery to the trustee of a certified copy of a resolution adopted by the unanimous vote of the board of directors of the Patrick Cudahy Family Company declaring the trust at an end; or

(d) Upon the dissolution of the Patrick Cudahy Family Company; or

(e) Upon the extinction of the issue of said Patrick and Anna M. Cudahy..

A copy of the said trust indenture is filed herewith as part hereof, marked "Exhibit B."

Said trust has never been terminated, and is still in full force and effect.

(3) Said Irene C. Helmholz departed this life on October 19, 1927, having theretofore made her last will and testament in words and figures as follows:

I, Irene C. Helmholz, being of sound mind this 22nd day of Jan. 1921, declare this to be my last will and testament, do hereby bequive to my husband, all my possessions.

IRENE C. HELMHOLZ.

Witnesses:

JOHN BANNEN.

J. W. BRYDEN.

Said will was duly admitted to probate by the Milwaukee County Court, Wisconsin, and the petitioner was by said court duly appointed as administrator with the will annexed of said estate, duly qualified as such, fully administered said estate, and was in due course discharged as such administrator.

(4) In an action brought in the Milwaukee Circuit Court by the trustee under said trust indenture for a construction of said indenture and of said last will and testament of Irene C. Helmholz, said will was held and duly adjudged by said court to be a valid and effectual exercise by said Irene C. Helmholz of the power of appointment reserved by her in said trust indenture, and that the petitioner was entitled to receive from the trustee the net dividends paid to the trustee in respect of said 999 shares of stock in the Patrick Cudahy Family Company for and during the term of the petitioner's natural life. Said judgment was, on appeal, duly affirmed by the Supreme Court of the State of Wisconsin, and the same is still in full force and effect.

(5) Referring again to the question of the fair market value of the said shares of stock in the Patrick Cudahy Family Company at the date of the decedent's death, the petitioner alleges
6 that said company is a corporation organized under the laws of the State of Wisconsin and that its articles of incorporation contained at the time of the decedent's death, and, upon information and belief, that they still contain, the following provisions:

"SECTION 1. No transfer of stock in this corporation shall be valid except in pursuance of the vote of a majority of all the outstanding shares and before offering the said stock in writing to the board of directors of this corporation at its par value and giving said board of directors ninety (90) days in which to sell said stock at such par value to the then stockholders of the corporation. At the expiration of ninety (90) days if no stockholders have purchased and paid for said stock, such stockholder or stockholders offering to sell shall have the right to sell to anyone whomsoever.

"SECTION 2. All of the shares of this corporation heretofore issued shall be recalled and shall be reissued to the stockholders and

such reissued shares shall have imprinted thereon in words or substance section 1 of this article, and such shares as may hereafter be issued shall likewise have so imprinted thereon such section."

The petitioner alleges, upon information and belief, that such provisions as the foregoing are held by the Supreme Court of Wisconsin to be valid and binding.

The board of directors of said corporation has offered the petitioner the par value of said one share of stock, which is $100, and has refused even to transfer said share to the petitioner on the books of the corporation. The petitioner still asserts ownership of said one share, but has been unable to obtain a higher offer therefor than the one above stated. Only one dividend has been received on any of said stock since the decedent's death, and that was one-half of 1 percent received in October 1930.

In view of the foregoing, the petitioner alleges that $100, and no more, was the fair market value of said one share of stock at the date of decedent's death, and that the respondent should have so found and determined; and, further, that if said 999 shares of stock are at all to be included in the gross estate of the decedent for purposes of determining the estate tax, which the petitioner respectfully denies, then said tax should be computed on the basis of said stock having a fair market value of $100 per share, and not $320 per share, as determined by the respondent.

(6) The said beneficial life interest in said 999 shares of stock passed to the petitioner in virtue of said trust indenture of June 7, 1918, and of the exercise by the decedent of the power of appointment reserved by the decedent in said indenture, by which exercise the decedent designated her husband, the petitioner, as the person to take the life interest created in and by said indenture next in remainder after the life interest of the decedent; that said beneficial life interest, if subject at all to the estate tax, is so subject by reason of the provisions of the Revenue Act of 1926 which relate to property passing by the exercise of such a power, and not by reason of any other provisions of said act; and that subsection (f) of section 302 of said act, which subsection is the only provision covering property so passing, relates specifically to "any property passing under a general power of appointment exercised by the decedent."

7 The said trust indenture contains the following provision:

"No appointment hereunder shall be effective for a longer period than the natural life of the appointee."

In view of the foregoing language of said subsection (f) of section 302, and of the said provision in said trust indenture, the petitioner alleges that the power of the appointment reserved by the decedent in said trust indenture was a special and not a general power, and hence that the transfer of the beneficial life interest in said 999 shares of stock was not, and is not, subject to an estate tax under the Revenue Act of 1926, and therefore the value of said

stock should not have been included by the respondent in determining the value of the gross estate of the decedent.

(7) The petitioner further alleges that all interests, life or other, in said 999 shares of stock passed to the beneficiaries of said trust by virtue of said trust indenture of June 7, 1918, and as of its said date, and not otherwise; that said trust indenture was not made by the decedent in contemplation of her death; and that while the remainder interests created by said indenture were by the terms of said instrument to take effect in possession and enjoyment at and after the death of the decedent, said indenture was executed and became effective prior to the enactment of said Revenue Act of 1926, and that should said act be construed as applying to transfers made prior to its passage, then said act deprives the petitioner of his property without due process of law and is as to such provision in conflict with the fifth amendment of the Constitution of the United States, and that such provision, if and when so construed, is void.

(8) Said trust indenture contains no provision for altering or amending the same; nor does it confer any power to revoke said trust, the said indenture merely defining the duration of said trust by providing that the same shall end upon the happening of any of certain specified events.

Moreover, the trust could not be terminated by the action of the decedent alone.

Wherefore, the petitioner prays that this Board may hear the proceeding and find and determine as follows:

1. That the fair market value of said shares of stock in the Patrick Cudahy Family Company at the time of the decedent's death was $100 per share and no more, and that said one share of said stock should have been assessed in the gross estate accordingly.

2. That the only provision of the Revenue Act of 1926 which prescribes an estate tax in respect of property passing by the exercise of a power of appointment is subsection (f) of section 302 thereof; that said subsection designates as being subject to the estate tax property passing under a general power of appointment, and such property only; that the power of appointment reserved and exercised by the decedent was a special power and not a general power; and that the beneficial life interest of the petitioner in said 999 shares of stock in the Patrick Cudahy Family Company should not have been included in the gross estate of the decedent.

3. That all interests in said 999 shares of stock in said the Patrick Cudahy Family Company passed by virtue of the said trust indenture of June 7, 1918, and as of that date, and not otherwise; and said transfer having been prior to the enactment of the Revenue Act of 1926, said 999 shares of stock should not, nor should any interest therein, have been included in the gross estate of the decedent; and

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4. That no deficiency estate tax was or is assessable in respect of the estate of said decedent.

As alternative prayers, and only in the event of a denial of the prayer contained in paragraph 4, supra, the petitioner further prays,

5. That, should the transfer of said 999 shares of stock be held liable to assessment at all for an estate tax, then

(a) That in computing the amount of such tax the fair market value of said stock at the time of the decedent's death be found and determined to have been $100 per share and no more; and

(b) That only the value of the petitioner's beneficial life interest in said 999 shares, and not the value of the full ownership of said shares, be included in the gross estate in making such assessment.

And the petitioner prays, finally, for such other and further relief, general and special, as under the law he may be entitled to in the premises.

JAMES QUARLES,
JAMES T. GUY,
196 West Water Street, Milwaukee, Wisconsin,
Counsel for Petitioner.

[*Duly sworn to by Waldemar R. Helmholz; jurat omitted in printing.*]

Exhibit A to petition

SEPT. 24, 1930.

MT-ET-Cl.-2331-CW.
District of Wisconsin.
Estate of Irene C. Helmholz.
Date of death—October 19, 1927.
WALDEMAR R. HELMHOLZ, *Executor,*
Estate of Irene C. Helmholz,
Helmholz Shoe Manufacturing Company,
Cudahy, Wisconsin.

SIR: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of June 19, 1930. The deficiency in Federal estate tax hereby determined amounts to $13,267.34, and is fully explained in the attached
9 statement, consisting of three pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so

within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) DAVID BURNET,
DAVID BURNET,
Commissioner.

Enclosures:
Statement,
Waiver—form 890.
LM.

The protest is directed against the following:

Gross estate	Returned	Tentatively determined	Determined
Real estate: Item 1	$80,000.00	$100,000.00	$100,000.00

At a hearing at the Bureau on August 15, 1930, the representative of the estate withdrew the protest as to this item.

Stocks and bonds: 1 share Patrick Cudahy Family Company	$240.00	$320.00	$320.00

The estate contends that this stock should not be valued in excess of $100.00 a share for the reason that under the bylaws of the company, the stock could not be sold to an outsider but must first
10 be offered for sale at par to the remaining stockholders of this company. Because of this provision in the bylaws of the company it is alleged that the Bureau has no right to include in the decedent's gross estate the value of this stock in excess of the amount for which it could be sold.

Upon examination of this provision of the bylaws of the company, it is evident that this provision is binding upon all stockholders during their lifetime, but there is nothing in the bylaws which makes

it mandatory that an executor of a deceased stockholder must offer the stock for sale at $100.00 a share to the remaining stockholders. Following the decision in the case of Louise N. Schulz v. Commissioner of Internal Revenue, reported in 14 B. T. A. 419, and affirmed on appeal by the Circuit Court of Appeals for the First Circuit in a decision rendered March 29, 1930 (Commerce Clearing House Service, volume 5, page 15770), it is the opinion of the Bureau that this provision of the bylaws of the Patrick Cudahy Family Company is not binding upon the executor. The tentatively determined value of $320.00 a share will be adhered to and no adjustment will be made therein.

Transfers: 999 shares common stock the Patrick Cudahy Family Company, transferred to a trustee by indenture dated June 7, 1918, income payable to decedent for life with power to appoint by will	$0.00	$319,680.00	$319,680.00

The estate protests the value determined for this stock and also the taxability of this trust contending that the decedent had only a limited power of appointment under the provisions of the trust and therefore, this power is not subject to Federal estate tax.

In connection with the value of this stock this matter is discussed under "Stocks and bonds."

It appears that the decedent in connection with the other stockholders transferred 999 shares of common stock to a trustee on condition that the income from said stock was to be paid to her during her lifetime. After her death the dividends were to be paid to the appointee under her will, and in the default of such appointment or after the death of the appointee the income was to be paid to the issue of the settlor by right of representation. The trust agreement contains the following provision:

"FIFTH. The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof, other than testamentary appointees; excepting the shares to the dividends upon
11 which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided. * * *"

Under the terms of the trust agreement the decedent reserved to herself not only the income from that part of the stock which she placed in the trust but had likewise the power in conjunction with

the other settlors to revoke the trust agreement. The Bureau is, therefore, of the opinion that the full value of the property transferred is taxable under sections 312 (c) and (d) of the Revenue Act of 1926.

Deductions:

	Returned	Tentatively determined	Determined
Debts of decedent	$2,856.01	$677.00	$2,431.01

It is evident from the record that real-estate taxes paid in the sum of $1,754.01 for the year 1927 should be allowed as a deduction.

Accordingly the following computation shows the estate-tax liability of the estate, which is hereby made final:

	Returned	Tentatively determined	Determined
Gross estate	$237,219.49	$594,561.99	$594,561.99
Deductions	133,542.59	145,253.24	147,009.25
Net estate	103,676.90	449,306.75	447,522.74
Tax liability	1,610.30	14,965.34	14,877.64
Deficiency		13,355.04	13,267.34
Credit allowable against determined tax on account of State inheritance tax paid	11,902.11		
Credit applicable against returned tax	1,288.24		
Credit applicable against deficiency tax			10,613.87
Portion of deficiency proposed for assessment			2,653.47

The portion of the deficiency proposed for assessment will bear interest at the rate of six per centum per annum from 1 year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

(For exhibit B of the original petition see exhibit A attached to statement of evidence.)

[File endorsement omitted.]

Before United States Board of Tax Appeals

[Title Omitted.]

Answer

Filed December 12, 1930

The Commissioner of internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, in
12 answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are estate taxes. Denies all other allegations contained in said paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. (1), (2), (3), and (4) admits the allegations contained in paragraph 5 (1), (2), (3), and (4).

5. (5), (6), (7), and (8) denies the allegations contained in In re: Appeal, Estate of Irene C. Helmholz, Docket No. 50485, paragraph 5 (5), (6), (7), and (8).

Denies all other allegations contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
LEWIS S. PENDLETON,
Special Attorney, Bureau of Internal Revenue.
LSP/lmh—12/4/30.

Before United States Board of Tax Appeals

WALDEMAR R. HELMHOLZ, EXECUTOR OF THE ESTATE OF IRENE C. Helmholz, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 50485. Promulgated May 23, 1933

The decedent, the grantee of a special power of appointment of an interest less than a fee, by will appointed her husband to receive the income from certain trust property during his life. The corpus of the trust had been irrevocably transferred and the trust agreement provided for the disposition of the remainder upon the termination of the trust. Held, no part of the trust property is to be included in the decedent's gross estate.

James Quarles, Esq., for the petitioner.

Lewis S. Pendleton, Esq., for the petitioner.

The Commissioner determined a deficiency of $13,267.34 in estate tax, which is subject to the credit for the State inheritance tax paid.

The issues for our determination are (1) whether the corpus of a certain trust, or any interest therein, is to be included in the decedent's gross estate; and (2) the fair market value of certain stock.

Findings of fact

The petitioner was duly appointed administrator of the estate of Irene C. Helmholz, and is the sole beneficiary under the
13 will of the decedent, who died on October 19, 1927, a resident of the State of Wisconsin.

On June 7, 1918, the decedent, her parents, brothers, and sisters, executed a trust agreement, which, insofar as material to our determination, is as follows:

Whereas all of the above-named subscribers are members of the immediate family of said Patrick Cudahy and in the aggregate are the owners of all of the capital stock of said the Patrick Cudahy Family Company except [exception not material]; and,

Whereas it is the earnest wish and desire of said subscribers to confine membership in said the Patrick Cudahy Family Company so far as practicable to those of the immediate family of said Patrick Cudahy, their descendents and appointees,

Now, therefore, in consideration of the premises and the several benefits accruing to each of the parties hereto and for other valuable considerations received by each of the parties hereto, the receipt whereof is hereby acknowledged, the subscribers hereto have sold, assigned, and transferred, and by these presents do sell, assign, and transfer to Wisconsin Trust Company as trustees, and to its successors in trust the shares of stock of said the Patrick Cudahy Family Company set opposite their respective names, each of said subscribers assigning and transferring the number of shares set opposite his or her name respectively, and each acting on his or her own account and not one for the other, to wit:

* * * * * * *

Irene C. Helmholz, nine hundred ninety-nine shares

* * * * * * *

To have and to hold, the said shares of stock, in trust, nevertheless, for the uses and purposes and upon the terms and conditions hereinafter expressed, and none other, that is to say:

* * * * * * *

Second: To receive all dividends, ordinary or extraordinary, or in liquidation, declared and paid on account of the said stock, and to distribute the same when and as received as hereinafter provided. * * *

* * * * * * *

Fourth: To pay and distribute the net amount of such dividends remaining after the payment of expenses of administration as aforesaid from time to time as follows, to wit:

(A) To each subscriber as long as he or she shall live the net dividends received in respect of the shares of stock by him or her respectively transferred and assigned as aforesaid.

(B) Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee.

In the event of the termination of the primary trust hereby created, no capital stock of the Patrick Cudahy Family Com-
14 pany or other capital assets shall be distributed to any such testamentary appointee * * *.

(C) If any subscriber shall die without making appointment as aforesaid, or if any appointee of such subscriber shall not be entitled to take or upon the termination of the term of any appointment, then said trustee shall from time to time pay the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid, or such portion thereof as shall be affected by such failure to appoint or inability of the appointee to take, or termination of the term of appointment, to the issue of such subscriber living at the time of distribution proportionately by right of representation.

(D) In the case a subscriber shall die without surviving issue, or the issue of a deceased subscriber shall become extinct after the death of such subscriber, and either (1) such subscriber shall not have made appointment as aforesaid, or (2) the appointee shall not be entitled to take, or (3) the term of appointment shall have expired, then and in either of such events the said trustee thereafter shall pay the net dividends in respect of the stock transferred by such deceased subscriber or that portion thereof affected by either or any of the foregoing contingencies to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation.

FIFTH: The term of the primary trust hereby created shall end * * * (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, * * * whereupon * * * the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereon other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

By a supplemental agreement dated June 11, 1918 (said agreement being executed before the acceptance of the trust by the trustee, and considered by the parties as completing the trust agreement and not an alteration thereof, the power of appointment was restricted to natural persons and charitable organizations.

The decedent left the following will;

I, Irene C. Helmholz, being of sound mind this 22nd day of Jan. 1921—declare this to be my last will and testament—do hereby bequive to my husband, all my possessions—

IRENE C. HELMHOLZ.

Witnesses:

JOHN BANNEN.

J. W. BRYDEN.

The above will was duly admitted to probate and the decedent's estate administered thereunder.

At the date of the death of the decedent, the articles of incorporation and the bylaws of the Patrick Cudahy Family Co., insofar as material hereto, were as follows:

"SECTION 1. No transfer of stock in this corporation shall be valid except in pursuance of the vote of a majority of all the
15 outstanding shares and before offering the said stock in writing to the board of directors of this corporation at its par value and giving said board of directors ninety (90) days in which to sell said stock at such par value to the then stockholders of the corporation. At the expiration of ninety (90) days if no stockholders have purchased and paid for said stock, such stockholder or stockholders offering to sell shall have the right to sell to any one whomsoever.

"SECTION 2. All of the shares of this corporation heretofore issued shall be recalled and shall be reissued to the stockholders and such reissued shares shall have imprinted thereon in words or substance Section 1 of this Article, and such shares as may hereafter be issued shall likewise have so imprinted thereon such section."

The petitioner sought to have one share of the capital stock of the Patrick Cudahy Family Co., transferred upon the books of that company and on December 4, 1928, the board of directors of the company adopted a resolution with respect to this share of the stock which, insofar as material hereto, is as follows:

"Whereas, W. R. Helmholz, as executor of the estate of Irene C. Helmholz, deceased, has tendered Certificate No. 9 for one (1) share of the capital stock of said corporation, issued and now outstanding in the name of Irene C. Helmholz, and has demanded that the same be transferred to W. R. Helmholz; and

"Whereas, the stockholders of this corporation desire that none of said shares of stock shall pass out of the hands of the descendants of Patrick Cudahy, the founder of this company;

"Now, therefore, be it resolved by the board of directors of the Patrick Cudahy Family Company that pursuant to the articles of incorporation and bylaws aforesaid, this corporation buy the said share of stock so tendered for the use and benefit of all the remaining stockholders of the corporation proportionately, and sell the same to said stockholders at the par value thereof, in such proportionate, fractional interests as shall divide the same equally among the stockholders joining in such purchase.

"Resolved, further, that the treasurer of the corporation pay to W. R. Helmholz the sum of one hundred dollars ($100.00) for the par value of said share of stock, and that the secretary of the corporation transfer the same upon the books of the company to the stockholders purchasing the same, and issue fractional shares therefor to the stockholders entitled to the same."

The petitioner, as administrator of the estate of Irene C. Helmholz, filed a Federal estate tax return and listed thereon as property belonging to the decedent at the time of her death one share of the Patrick Cudahy Family Co. stock valued at $240. In determining the deficiency, the respondent included this share of stock in the gross estate at a valuation of $320. In determining the deficiency the respondent also included as a part of the decedent's gross estate 999 shares of the Patrick Cudahy Family Co., valued at $320 per share, which had been transferred by this decedent to the Wisconsin Trust Co. on June 7, 1918.

In the statement attached to the deficiency notice is the following explanation.

"Upon examination of this provision of the bylaws of the company, it is evident that this provision is binding upon all
16 stockholders during their lifetime, but there is nothing in the bylaws which makes it mandatory that an executor of a deceased stockholder must offer the stock for sale at $100.00 a share to the remaining stockholders. Following the decision in the case of Louise N. Schulz v. Commissioner of Internal Revenue, reported in 14 B. T. A. 419, and affirmed on appeal by the Circuit Court of Appeals for the First Circuit in a decision rendered March 29, 1930 (Commerce Clearing House Service, volume 5, page 15770), it is the opinion of the bureau that this provision of the bylaws of the Patrick Cudahy Family Company is not binding upon the executor. The tentatively determined value of $320.00 a share will be adhered to and no adjustment will be made therein.

* * * * * * *

"Under the terms of the trust agreement the decedent reserved to herself not only the income from that part of the stock which she placed in the trust but had likewise the power in conjunction with the other settlors to revoke the trust agreement. The Bureau is, therefore, of the opinion that the full value of the property transferred is taxable under sections 312 (c) and (d) of the Revenue Act of 1926."

The appraisers appointed by the county court of Milwaukee County to appraise the property in the decedent's estate, appraised one share of stock of the Patrick Cudahy Family Co. at the fair market value of $100, and determined the fair market value of the life estate of the decedent's appointee to be $65,829.11. The average dividend upon the stock of the Patrick Cudahy Family Co. from 1909 (when organized) to 1932, was $6.14 per share. The fair market value of such stock at the date of the decedent's death was $100 per share.

Opinion

SMITH: No jurisdictional question has been raised by either party to this proceeding, but because of the record made herein we deem it advisable to consider that question. Cf. Martha M. Hanify, 21 B. T. A. 379. The deficiency notice was addressed to "Waldemar R. Helmholz, Executor, Estate of Irene C. Helmholz." The petition, captioned "Waldemar R. Helmholz, as sole devisee and legatee under the will of Irene C. Helmholz, deceased", was based upon that notice. In his petition the petitioner alleged, and the respondent admitted, that "the petitioner was and is the sole beneficiary under the will of said Irene C. Helmholz, and it is in that capacity he prosecutes this appeal." It appears that the petitioner duly administered the estate, made final settlement of his accounts, and was discharged as administrator by the county court of Milwaukee County in September 1928. It does not appear that the petitioner ever notified the Commissioner of such final settlement and discharge. The settlement of the estate and the final discharge of the administrator before the tax obligations were discharged neither extinguished the tax nor relieved the petitioner from his liability under the law to pay it. Petitioner has invoked the jurisdiction of this Board for a redetermination of the deficiency set forth in the notice addressed to him as executor of the decedent's estate. No one has been misled as to the liability asserted. In these circum-
17 stances we accept jurisdiction of the proceeding. Charles Hallock Whitehead, Executor, 24 B. T. A. 1111; Jessie Smith, Executrix, 24 B. T. A. 807; Commissioner v. New York Trust Co., 54 Fed. (2d) 463; certiorari denied, 285 U. S. 556.

The primary issue is whether the 999 shares of stock, or any interest therein, which the decedent placed in the trust created by the decedent, her parents, brothers, and sisters in 1918, should be included in her gross estate. The respondent contends "that the value of the property in question was properly included in the gross estate under the provisions of section 302 (c) and section 302 (d) of the Revenue Act of 1926." The petitioner insists that not even the life interest of the decedent's appointee should be included in the gross estate. Insofar as material hereto, section 302 of the Revenue Act of 1926 is as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the

enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * *

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

In construing the decedent's will as a valid exercise by Irene C. Helmholz of the power of appointment reserved in the trust agreement, the Supreme Court of Wisconsin, in First Wisconsin Trust Co. v. Helmholz, 198 Wis. 573; 225 N. W. 181, 183, said:

"* * * She had a most hazy conception of the change which the trust deed had wrought upon her rights in and title to the corporate stock conveyed by that deed. In drafting her will she used the language of the layman. So far as the terms of her will were concerned, her husband was constituted her sole beneficiary. We glean no purpose from the terms of the will to make any other person the beneficiary of her bounty. She probably was not conscious of the necessity of exercising her power of appointment by her last will and testament, and a specific intent to that end probably was not present in her mind, but it does most satisfactorily appear that she intended to make her husband the beneficiary of all
18 and everything of value which she could confer upon him by her last will and testament. If this purpose on her part is to be given effect, the will must be construed as an exercise of the power of appointment. Not to do so would be recreant to the sacred trust with which the judiciary stands charged, inconsistent with established principles of law, and especially the uniform rulings of this court.

The Supreme Court of Wisconsin affirmed the trial court in holding that the decedent's husband was "beneficiary of the dividends accruing from or paid upon the 999 shares of stock conveyed by her trust deed."

By the provisions of the trust deed, the remainders after the life estate of the grantors and their appointees were vested in the issue of such grantors, and, failing issue, in a designated charitable trust—such remainders taking effect upon the termination of the primary trust. If it were not for the provision for the termination of the trust and the power of appointment reserved by the decedent, we would have no hesitancy in holding that the corpus of this trust should not be included in the decedent's gross estate under the ruling in May v. Heiner, 281 U. S. 238, which was followed per curiam in

Burnet v. Northern Trust Co., 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783; and McCormick v. Burnet, 283 U. S. 784. See also Elizabeth B. Wallace, Executrix, 27 B. T. A. —.

In Charles H. W. Foster et al., Executors, 26 B. T. A. 708; affd., — Fed. (2d) — (C. C. A., 1st Cir., March 20, 1933), we said:

"* * * Where, as here, gifts are made irrevocably to a trust and the donor reserves the income to himself for life and the right to designate the beneficiaries of the income after his death, which right is exercised in accord with the trust agreement, it is doubtful whether any portion of the trust property should be included in the decedent's gross estate in view of the decision in May v. Heiner, supra. Such doubts should be resolved in favor of the taxpayer (Gould v. Gould, 245 U. S. 151, 153), particularly in view of the fact that immediately following the per curiam decisions in Burnet v. Northern Trust Co., supra; Morsman v. Burnet, supra; McCormick v. Burnet, supra, Congress amended section 302 (c) of the Revenue Act of 1926 by joint resolution (Public, 131), approved March 4, 1931, which specifically provides for the inclusion of property transferred in trust where the transferor "has retained for his life * * * the income from the property or * * * the right to designate the persons who shall * * * enjoy * * * the income therefrom." The amendment was not retroactive and has been applied only to transfers "made after 10:30 p. m. * * * March 3, 1931." Treasury Decision 4314. See United States v. Field, 255 U. S. 257.

The provision for the termination of the trust, "upon delivery to the * * * trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end", did not render the trust revocable. The grantors of the trust are generally referred to as the subscribers, but assuming that the term "beneficiaries" embraces the grantors, no one of them could have revoked the trust alone. As was said by the Circuit Court of Appeals for the First Circuit in White v. Erskine, 47 Fed. (2d) 1014, 1016:

19 "* * * but where the decedent has no such power except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries, the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act.

See also Reinecke v. Northern Trust Co., 278 U. S. 339, 346; Union Guardian Trust Co., 26 B. T. A. 1321, 1324.

In Porter v. Commissioner, — U. S. —, decided March 13, 1933, the Supreme Court pointed out that:

"* * * Congress has progressively expanded the bases for such taxation. Comparison of § 302 with corresponding provisions of earlier acts warrants the conclusion that (d) is not a mere specification of something covered by (a) but that it covers something not included therein. Cf. Chase National Bank v. United

States, 278 U. S. 327. Tyler v. United States, 281 U. S. 497. Gwinn v. Commissioner, 287 U. S. —. Burnet v. Guggenheim, 287 U. S. —.

"* * * Subdivision (d) requires to be included i nthe calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. * * * Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).

"* * * the reservation here * * * while subject to the specified limitation [that there could be no change in favor of the grantor or his estate], * * * made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. * * *"

In the instant proceeding, Mrs. Helmholz had irrevocably disposed of the corpus of the trust, and that property went to the remaindermen designated in the trust agreement, upon the termination of the trust. She had no power to alter, amend, or revoke the trust instrument that would effect such a disposition as was possible in the Porter case and bring the property within the purview of the subdivision (d).

In White v. Erskine, supra, the Circuit Court of Appeals for the First Circuit, in construing subdivision (d) of the statute, said:

"To hold that Congress under subdivision (d) intended under the guise of a tax on the transfer of property at death to impose a tax solely on a limited power of alteration of a trust, or a limited power of appointment under it, would be contrary, not only to the spirit of the act, but the express terms of section 301, Leser, Executrix, v. Burnet, Com., supra; Fedelity-Phila. Trust Co., v. McCaughn (C. C. A.) 34 F. (2d) 600, 604, and so doubtful a construction that the contrary intent should be resolved in favor of the taxpayer, Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.

20 Having found that the corpus of the trust here involved was not within the purview of subdivisions (c) and (d) of the statute, and by applying the cognate reasoning of the Porter case, it is reasonable to conclude that subdivision (f) covers prop-

erty not otherwise specified in section 302. See also United States v. Field, 255 U. S. 257. That being the case, is the property here involved to be included in the decedent's gross estate by reason of her power of appointment?

We have had occasion to determine what "property passing under a general power of appointment exercised by the decedent * * * by will" was to be included in the gross estate of such decedent. Where the appointment has been general and unrestricted and upon the exercise thereof effectively disposed of the corpus, we have held that the appointed property was includable in the gross estate. See Emily Annette Agnus Leser, Executrix, 17 B. T. A. 266; Edward J. Hancy, Executor, 17 B. T. A. 464; Mary M. Lee, Executrix, 18 B. T. A. 251; affd., 57 Fed. (2d) 399; Cortland F. Bishop, Executor, 23 B. T. A. 920; Joseph Walker Wear et al., Executors, 26 B. T. A. 682. See also Stratton v. United States, 50 Fed. (2d) 48.

In John S. Montgomery et al., Executors, 17 B. T. A. 491, we held that the respondent correctly included the present worth of certain equitable life estates in the decedent's gross estate under section 402 (e) of the Revenue Act of 1921, which is similar to the applicable provision of the 1926 act here involved. In that case it appears that in 1898 Samuel M. Child created a trust for the benefit of designated beneficiaries, including the decedent (Harriette Hall Morris). The trust continued until the death of the last surviving beneficiary. Upon the death of each beneficiary he or she had a general power of appointment over his or her interest in the trust, that is, to dispose of the income during the continuance of the trust and to dispose of the corpus upon the termination of the trust. The decedent exercised her power of appointment, but with void limitations over. In holding that the present worth of the life estates appointed by the decedent's will should be included in her gross estate, we ignored the remainders, which nevertheless passed to her descendants just as if she had failed to exercise her power of appointment. These facts distinguish the Montgomery case from the instant proceeding.

In Leser v. Burnet, 46 Fed. (2d) 756, the Circuit Court of Appeals for the Fourth Circuit in part reversed the Board's decision (Emily Annette Agnus Leser, Executrix, supra) and held that only property subject to a general power of appointment was to be included in the gross estate of the donee of such power. The court said: "* * * The first question to be determined, therefore, is what is meant by a general power within the meaning of the act, and we think there can be no question that by a general power is meant one which may be exercised by the donee of the power in favor of any person whomsoever including the donee himself or his own creditors.

* * * * * * *

In this respect, the case of a general power of appointment is analogous to that of a policy of insurance where the insured has the right to change the beneficiary and thus secure for his
21 estate or his creditors the proceeds of the policy. In such case it is held that the proceeds of the policy may properly be included in the estate of the insured for the purpose of the estate tax. See Chase Nat. Bank v. U. S., 278 U. S. 327, 335, 49 S. Ct. 126, 127, 73 L. Ed. 405, 63 A. L. R. 388.

* * * * * * *

The inclusion for purposes of estate taxation of property transferred under a general power is analogous also to the inclusion of property transferred in trust with power of revocation reserved to the grantor. It is held that upon the grantor's death such property should be included in valuing his gross estate, upon the principle that the passing from him of the power and control over the property is taxable as a transfer. Reinecke v. Trust Co., 278 U. S. 339, 345, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397; Saltonstall v. Saltonstall, 276 U. S. 260, 271, 48 S. Ct. 225, 72 L. Ed. 565.

Except that the donee of a general power may exercise it in favor of his creditors and thus use the property which is the subject of the power for his own use and benefit, there is no basis for including in his taxable estate property which is subject thereto; for this right is all that passes from his estate by reason of his death. In Y. M. C. A. v. Davis, 264 U. S. 47, 44 S. Ct. 291, 292, 68 L. Ed. 558, the Supreme Court said: "What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death." By this language we understand the court to mean that the tax is imposed on what is transferred from decedent as a result of his death (New York Trust Co. v. Eisner, 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963, 16 A. L. R. 660; Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969); and it logically follows that, where nothing is transferred, as where property passes under a limitation in remainder, there is no transfer to tax. Reinecke v. Trust Co., supra. Nothing passes or is transferred from the estate of the donee in the case of a naked or special power of appointment, and Congress has recognized this fact by not requiring that property passing under a special power be included in the estate. It is only property subject to a general power—property of which the donee might have obtained the benefit by subjecting it to the payment of his debts—which is required to be included.

The court then proceeded to determine "whether the power created by the conveyance * * * is a general power" under the laws of Maryland, saying:

"* * * Only by considering, not merely the language creating a power, but the effect and meaning which is given that language by the law of the state which governs the exercise of the power, can uniformity in the operation of the statute be attained."

Under the terms of the trust indenture involved in the instant proceeding, the only power of appointment reserved to the decedent was the power to appoint the beneficiary of her share of the income, and merely for the life of her appointee. Her power of appointment did not cover the corpus of the trust, which had irrevocably passed beyond her control and which went to her issue upon the termination of the trust. Her power to appoint a life beneficiary was
22 restricted to a natural person and/or a charitable organization which, if appointed, could only receive the income during the remainder of the term of the trust.

General and special powers are defined in the Wisconsin Statutes (1927) as follows:

"SEC. 232.05. General Power. A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power to any alienee whatever.

"SEC. 232.06. Special Power. A power is special:

"(1) When the person or class of persons to whom the disposition of the lands under the power to be made are designated.

"(2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

Special powers in trust are defined in section 232.22 as follows:

"A special power is in trust:

"(1) When the disposition which it authorizes is limited to be made to any particular persons other than the grantee of such power.

"(2) When any person or class of persons, other than the grantee, is entitled to any benefit from the disposition or charge authorized by the power."

The term grantee as so used includes the person in whom the power of appointment is vested by reservation, as in the instant proceeding. See section 232.58. While these definitions are a part of the real property law of Wisconsin, they are applied as the personal property law. Cawker v. Dreutzer (Wis.), 221 N. W. 401, 413. The power of appointment reserved to the decedent embraced an interest less than a fee, the disposition within the exercise of the power was limited to persons other than the grantee, and the benefit thereunder was restricted to the life of a natural person or a charitable organization for the remainder of the term. The power of appointment reserved to the decedent was therefore a special power (cf. Cawker v. Dreutzer, supra), and since the revenue act covers only property passing under a general power, the interest conveyed by the decedent's exercise of this special power of appointment, to wit, the life estate of this petitioner, should not be included in the gross estate. Leser v. Burnet, supra.

The secondary question is the fair market value of the one share of stock which the respondent has included in the gross estate at a value of $320, and which the petitioner contends had a fair market

value of only $100. There were no sales of this stock, and when the petitioner sought to have it transferred to himself he was offered $100 for it. The restrictions upon the disposition of this stock were valid and enforceable under the law of Wisconsin. See In re Laun, 146 Wis. 252; 131 N. W. 366; Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517; 149 N. W. 754. Unlike the situation considered in Estate of Louise N. Schulz, 14 B. T. A. 419, the directors of the Patrick Cudahy Family Co. tendered $100 to the petitioner in an effort to purchase this share; it does not appear whether or not the tender was accepted. The appraisers for the State of Wisconsin considered the restrictions upon the transfer of this stock in determining a valuation of $100. When these restrictions are considered in the
23 light of the dividend record of the corporation, and the fact that it was a close family affair, we are unable to conceive of a concourse of buyers and sellers that would give this stock the fair market value determined by the respondent. In these circumstances we sustain the petitioner's valuation of $100 for this share. Cf. Herbert W. Eldredge, 18 B. T. A. 194; Richard deZ. Pierce et al., Administrators, 22 B. T. A. 1070.

Reviewed by the Board.

Judgment will be entered under Rule 50.

STERNHAGEN dissents.

Before United States Board of Tax Appeals, Washington

Docket No. 50485

WALDEMAR R. HELMHOLZ, EXECUTOR OF THE ESTATE OF IRENE C. Helmholz, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the findings of fact and opinion of the Board in the above-entitled proceeding promulgated May 23, 1933, parties litigant, on October 26, 1933, filed with this Board an agreed recomputation of estate tax liability of the above-named petitioner. Wherefore, it is

Ordered and decided that there is a deficiency in estate tax due from the petitioner in the amount of $143.86.

(Signed) CHARLES P. SMITH,
Member.

Enter:

CPS:ra.

Entered October 31, 1933.

[File endorsement omitted.]
[Title omitted.]

Before United States Board of Tax Appeals

Stipulation for Review by the Court of Appeals of the District of Columbia

Filed January 19, 1934

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the decision of the United States Board of Tax Appeals in the above-entitled cause dated
24 October 30, 1933, may be reviewed by the Court of Appeals of the District of Columbia.

This agreement is made under and pursuant to the provisions of Section 1002 (d) of the Revenue Act of 1926.

January 17, 1934.

JAMES QUARLES,
Attorney for Petitioner.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue, Attorney for Respondent.

In Court of Appeals of District of Columbia

[File endorsement omitted.]
[Title omitted.]

Petition for review and assignments of error

Filed January 20, 1934

To the honorable judges of the Court of Appeals of the District of Columbia

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, E. Barrett Prettyman, general counsel, and Lewis S. Pendleton, special attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is the statutory executor of the estate of Irene C. Helmholz, deceased, within the meaning of section 300 (a) of the Revenue Act of 1926 and is also

the sole devise and legatee under the will of said Irene C. Helmholz, deceased. Pursuant to section 1002 (d) of the Revenue Act of 1926, the parties hereto have agreed by stipulation filed with the Board on January 19, 1834, that the Board's decision may be reviewed by the Court of Appeals of the District of Columbia.

II

The nature of the controversy is as follows, to wit: Irene C. Helmholz died on October 19, 1927, leaving a will wherein she devised and bequeathed all of her property to her husband, Waldemar R. Helmholz, the petitioner herein.

On June 7, 1918, the decedent, her father and mother, brothers and sisters, each acting on his or her own account and not for the others, joined in the execution of a trust indenture wherein they transferred to the Wisconsin Trust Company certain shares of stock of the Patrick Cudahy Family Company. 999 of said shares were transferred by this decedent. Under the terms of the indenture, the shares transferred by each of the several contributors were to be held upon the following trusts: (a) To pay the net income received in respect of the shares transferred by each subscriber to such subscriber as long as he or she should live; (b) upon the death of a subscriber to pay said net income to such person or persons for life as said subscriber might by will appoint and upon failure to appoint or upon expiration of the term of appointment, then to pay said net income to the issue of said subscriber at the time of distribution. In case a subscriber should die without surviving issue, it was provided that the income should be paid to the surviving subscribers or their issue living at the time of distribution. The trust was to end upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, father and mother of the decedent, whereupon the corpus was to be distributed to the beneficiaries then entitled to receive the net income. It was further provided that the trust should terminate upon the extinction of issue of the decedent's parents, whereupon the trustee should transfer the corpus of the trust to the Milwaukee Foundation. The trust indenture also provided that the trust should terminate "upon delivery to the trustee of a written instrument signed by all of the then beneficiaries" and that if any of the stock should be withdrawn by act of the parties, the trust should continue nevertheless in respect of the stock not so withdrawn. In her last will and testament, the decedent executed the power of appointment over the income in favor of her husband, the said Waldemar R. Helmholz.

At the time of the death of Irene C. Helmholz, the articles of Incorporation and bylaws of the Patrick Cudahy Family Company contain the following provisions:

"SECTION 1. No transfer of stock in this corporation shall be valid except in pursuant of the vote of a majority of all the outstanding shares and before offering the said stock in writing to the board of directors of this corporation at its par value and giving said board of directors ninety (90) days in which to sell said stock at such par value to the then stockholders of the corporation. At the expiration of ninety (90) days if no stockholders have purchased and paid for said stock, such stockholder or stockholders offering to sell shall have the right to sell to anyone whomsoever.

"SECTION 2. All of the shares of this corporation heretofore issued shall be recalled and shall be reissued to the stockholders and such reissued shares shall have imprinted thereon in words or substance section 1 of this article, and such shares as may hereafter be issued shall likewise have so imprinted thereon such section."

The taxpayer filed a Federal estate tax return and listed therein as property belonging to the decedent at the time of her death, one share of the Patrick Cudahy Family Company, valued at $240.00. In determining the Federal estate tax on the estate of said Irene C. Helmholz, deceased, the Commissioner included said one share of stock at a valuation of $320.00. The Commissioner also
26 included as a part of decedent's gross estate the 999 shares of the Patrick Cudahy Family Company, transferred by decedent to the Wisconsin Trust Company at a valuation of $320.00 per share. As a result of these and other adjustments, the Commissioner notified the taxpayer that there was a deficiency proposed for assessment against him of $2,653.47. The taxpayer filed a petition with the United States Board of Tax Appeals and in due course a hearing was held before the Board. On May 23, 1933, the Board promulgated its opinion and interlocutory decision holding that said 999 shares of the Patrick Cudahy Family Company should be excluded from the decedent's gross estate and valuing the one share of said stock belonging to the decedent at the time of her death at $100.00. On October 30, 1933, the Board entered its final order, determining a deficiency in estate tax due from the taxpayer in the amount of $143.86.

III

The Commissioner being aggrieved by the findings of fact and conclusions of law contained in said decision desires to obtain a review thereof by the Court of Appeals of the District of Columbia. Wherefore he petitions that a transcript of the record be prepared in accordance with the rules of said Court and transmitted to the Clerk for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

IV

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in determining that the value of 999 shares of Patrick Cudahy Family Company stock transferred

by the decedent to the Wisconsin Trust Company under trust indenture dated June 7, 1918, should be excluded from the decedent's gross estate.

The Board of Tax Appeals erred in failing to determine that the transfer of said 999 shares of Patrick Cudahy Family Company stock constituted a transfer intended to take effect in possession or enjoyment at or after the decedent's death, within the meaning of section 302 (c) of the Revenue Act of 1926.

3. The Board of Tax Appeals erred in failing to determine that the enjoyment of said 999 shares of Patrick Cudahy Family Company stock was subject to change through the exercise of a power either by the decedent alone or in conjunction with others to alter, amend or revoke the trust within the meaning of section 302 (d) of said act.

4. The Board of Tax Appeals erred in failing to determine that the value of said 999 shares of Patrick Cudahy Family Company stock to the extent of the equitable life interest therein of her husband, Waldemar R. Helmholz, passed to decedent's said husband under a general power of appointment exercised by the decedent by will within the meaning of section 302 (f) of said act.

5. The Board of Tax Appeals erred in holding that restrictions contained in the bylaws of the Patrick Cudahy Family Company were binding upon the Commissioner in valuing the stock of said company for purposes of taxation.

27 6. The Board of Tax Appeals erred in finding as a fact that the Patrick Cudahy Family Company stock was worth $100.00 per share.

7. The Board of Tax Appeals erred in failing to find that the value of said stock was $320 per share as determined by the Commissioner.

8. The Board of Tax Appeals erred in determining that there is a deficiency due from the petitioner of only $143.86.

9. The Board of Tax Appeals erred in failing to determine that there is a deficiency due from petitioner in the sum of $2,653.47.

FRANK J. WIDEMAN,
Assistant Attorney General.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Of counsel:

LEWIS S. PENDLETON,
Special Attorney, Bureau of Internal Revenue.

[*Duly sworn to by Lewis S. Pendleton; jurat omitted in printed.*]

[File endorsement omitted.]

In Court of Appeals of the District of Columbia

[Title omitted.]

Notice of filing petition for review

Filed January 24, 1934

To JAMES QUARLES, Esq.,
Southern Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 20th day of January 1934, file with the clerk
28 of the United States Board of Tax Appeals, Washington, D. C., a petition for review by the Court of Appeals of the District of Columbia, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 20th day of January 1934.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22 day of January 1934.

(Signed) JAMES QUARLES,
Attorney for Respondent on Review.

[File endorsement omitted.]

In Court of Appeals of the District of Columbia

[Title omitted.]

Notice of filing petition for review

Filed February 6, 1934

To WALDEMAR R. HELMHOLZ,
201 Beacon Avenue, South Pasadena, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 20th day of January 1934, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the Court of Appeals of the District of Columbia, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 20th day of January 1934.

(Signed) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 22 day of January 1934.

(Signed) WALDEMAR R. HELMHOLZ,
Respondent on Review.

29 In Court of Appeals of the District of Columbia

Docket No. 50485

United States Board of Tax Appeals. Lodged Mar. 24, 1934.
(Endorsed): United States Board of Tax Appeals. Filed Mar. 26, 1934.
Received Mar. 24, 1934. U. S. Board of Tax Appeals.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WALDEMAR R. HELMHOLZ, AS EXECUTOR, SOLE DEVISEE, AND LEGATEE Under the Will of Irene C. Helmholz, Deceased, respondent

Statement of evidence

The above-entitled cause came on for hearing before the Hon. Charles P. Smith, a member of the United States Board of Tax Appeals at Washington, D. C., on December 8, 1932, there being present the respondent on review (hereinafter referred to as the taxpayer), by his attorney, James Quarles, and the petitioner on review (hereinafter referred to as the Commissioner), by his attorney, Lewis S. Pendleton.

Stipulation re certain facts

It was stipulated by and between the parties that at the date of death of Irene C. Helmholz, the articles of incorporation and the bylaws of the Patrick Cudahy Family Company contained the following provisions:

"SECTION 1. No transfer of stock in this corporation shall be valid except in pursuance of the vote of a majority of all the outstanding shares and before offering the said stock in writing to the board of directors of this corporation at its par value and giving said board of directors ninety (90) days in which to sell said stock at such par value to the then stockholders of the corporation. At the expiration of ninety (90) days, if no stockholders have purchased and paid for said stock, such stockholder or stockholders offering to sell shall have the right to sell to anyone whomsoever.

"SEC. 2. All of the shares of this corporation heretofore issued shall be recalled and shall be reissued to the stockholders and such reissued shares shall have imprinted thereon in words or substance

section 1 of this article, and such shares as may hereinafter be issued shall likewise have so imprinted thereon such section."

It was further stipulated that a copy of the trust indenture dated June 7, 1918, referred to in paragraph (2) on page 5 of the petition filed with the Board, together with a copy of the supplemental indenture dated June 11, 1918, might be introduced and read in evidence. Copies of these instruments as received in evidence before the Board are attached hereto and made a part of this statement of evidence as exhibits A and B. The taxpayer also introduced in evidence the depositions of John Bannen and Fred W. Rogers taken pursuant to the order of the Board of Tax Appeals dated November 3, 1932. So much of that evidence as is material and necessary to the determination of the assignments of error contained in the petition for review is hereinafter set forth in narrative form.

30 Copy of the exhibits referred to in the testimony as exhibits 1, 2–A, and 2–B are attached hereto and made a part of this statement of evidence.

John Bannen, called as a witness on behalf of the taxpayer, being first duly sworn, testified on direct examination, as follows:

My name is John Bannen. I am now and have been manager of the Patrick Cudahy Family Company since the time of its incorporation in 1909. I had charge of the books and am familiar with the dividend record of the corporation during that period. The paper marked "Exhibit 1" is the correct dividend record of the company, as compiled from the books. No dividends were paid in 1909, 1921, 1922, 1923, 1929, and 1930. The paper marked "Exhibit 2–A" is a letter which was mailed to Waldemar Helmholz, notifying him of the resolution of the board of directors of the Patrick Cudahy Family Company. The paper marked "Exhibit 2–B" is a correct copy of the resolution adopted by the board of directors of the Patrick Cudahy Family Company on December 4, 1928.

Q. And exhibit 2–A was mailed to Waldemar Helmholz, was it?

A. It was.

Q. Was that resolution carried out by the board of directors?

A. It was.

(The papers marked for identification as taxpayer's "Exhibits 1, 2–A, and 2–B" were thereupon offered and received in evidence.)

Fred W. Rogers, called as a witness on behalf of the taxpayer, being first duly sworn, testified on direct examination, as follows:

My name is Fred W. Rogers. I am now and have been for about twenty-eight years court appraiser for the county court of Milwaukee County. I was one of the appraisers appointed by said court to appraise the property of the estate of Irene C. Helmholz. William E. McCarty was the other appraiser. At that time I appraised the one share of the Patrick Cudahy Family Company belonging to said estate and also the life estate of Waldemar R. Helmholz in 999 shares of said company, which were held in trust by the First Wisconsin National Bank under trust indenture dated June 7, 1918. I

originally valued the one share of the Patrick Cudahy Family Company at $220.00, based upon the asset and liability statement. Later I changed this valuation and finally found the fair market value of said one share to be $100.00. This valuation was based upon a provision in the articles of incorporation of the Patrick Cudahy Family Company. The provision which I had in mind is that contained in exhibit 2–B. The value of $100.00 per share was accepted by the county court of Milwaukee County. I valued the life estate of Waldemar Helmholz in the 999 shares of the Patrick Cudahy Family Company held in trust by the First Wisconsin National Bank at $65,829.11. The basis was $100.00 a share on 999 shares and the valuation was computed in accordance with established statutory tables for inheritance tax purposes.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals and the same is approved by the undersigned, Robert H. Jackson, general counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue.

31 The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

(Signed) JAMES QUARLES,
Attorney for Respondent on Review.

Order settling statement of evidence

The foregoing is all of the material evidence adduced at the hearing and in order that same may be preserved and made a part of the record, this statement of evidence is dully approved and settled this 26th day of March 1934.

CHARLES P. SMITH,
Member United States Board of Tax Appeals.

Exhibit A

Indenture, made this 7th day of June 1918, by and between Patrick Cudahy, Anna M. Cudahy, Elizabeth C. Beck, Mary C. Dahlman, Irene C. Helmholz, Katherine C. Ferneding, Josephine C. Hoyt, John Cudahy, and Michael F. Cudahy, hereinafter designated subscribers, parties of the first part, and Wisconsin Trust Company, a Wisconsin corporation, hereinafter designated trustee, party of the second part, witnesseth:

Whereas the said Patrick Cudahy has heretofore caused to be organized a corporation under the laws of the State of Wisconsin known as the Patrick Cudahy Family Company; and,

Whereas all of the above-named subscribers are members of the immediate family of said Patrick Cudahy and in the aggregate are the owners of all of the capital stock of said the Patrick Cudahy Family Company except one thousand shares thereof belonging to the estate of Helen M. Cudahy, a deceased daughter of said Patrick Cudahy, and one thousand shares thereof belong to Patrick Cudahy Institute, a Wisconsin corporation; and,

Whereas it is the earnest wish and desire of said subscribers to confine membership in said the Patrick Cudahy Family Company, so far as practicable to those of the immediate family of said Patrick Cudahy, their decendants and appointees.

Now, therefore, in consideration of the premises and the several benefits accruing to each of the parties hereto and for other valuable considerations received by each of the parties hereto, the receipt whereof is hereby acknowledged, the subscribers hereto have sold, assigned, and transferred, and by these presents do sell, assign, and transfer to Wisconsin Trust Company as trustee, and to its successors in trust the shares of stock of said the Patrick Cudahy Family Company set opposite their respective names, each of said subscribers assigning and transferring the number of shares set opposite his or her name, respectively, and each acting on his or her own account and not one for the other, to wit:

Patrick Cudahy, forty-nine shares.
Anna M. Cudahy, thirty-five hundred forty-nine shares.
Elizabeth C. Beck, nine hundred ninety-nine shares.
Mary C. Dahlman, nine hundred ninety-nine shares.
Katherine C. Ferneding, nine hundred ninety-nine shares.
Josephine C. Hoyt, nine hundred ninety-nine shares.
Irene C. Helmholz, nine hundred ninety-nine shares.
32 Michael F. Cudahy, eight hundred ninety-nine shares.
John Cudahy, nine hundred ninety-nine shares.

To have and to hold, the shares of stock, in trust nevertheless, for the uses and purposes and upon the terms and conditions hereinafter expressed, and none other, that is to say:

First. To execute and deliver to whomsoever all or a majority in interest of the beneficiaries under this agreement (being issue of Patrick Cudahy and Anna M. Cudahy) their executors, administrators, and guardians, from time to time in writing shall direct, a proxy or proxies to vote said shares of stock at any and all stockholders' meetings of the said the Patrick Cudahy Family Company in such manner as the holder of such proxy for the time being shall deem best.

Second. To receive all dividends, ordinary or extraordinary, or in liquidation, declared and paid on account of the said stock, and to distribute the same when and as received as hereinafter provided. The action of the board of directors of said corporation in declaring or omitting to declare dividends shall be conclusive upon all persons having or claiming to have rights under this agreement.

Third. To pay out of the dividends received in respect of said stock the expense of the administration of said trust, including any and all taxes which said trustee may be required to pay by any present or future law and such attorneys' or counsel fees as it shall in its discretion deem requisite or expedient to spend in the performance of its duties as trustee.

Fourth. To pay and distribute the net amount of such dividends remaining after the payment of expenses of administration as aforesaid from time to time as follows, to wit:

(A) To each subscriber as long as he or she shall live, the net dividends received in respect of the shares of stock by him or her respectively transferred and assigned as aforesaid.

(B) Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee.

In the event of the termination of the primary trust hereby created, no capital stock of the Patrick Cudahy Family Company or other capital assets shall be distributed to any such testamentary appointee, but the portion thereof to the dividends or income upon which such testamentary appointee is then entitled shall thereafter be held by said Wisconsin Trust Company for the term of such appointment, in trust, to pay the net dividends or income thereof pursuant to such appointment, with full power in said trustee to sell, convey, transfer, participate in voluntary or judicial partitions, and to invest and reinvest the same and the proceeds thereof, and upon the termination of the term of said testamentary appointment the said capital stock of the Patrick Cudahy Family Company or other capital assets shall be distributed as hereinafter provided for the distribution of the same upon the termination of the primary trust hereby created.

33 (C) If any subscriber shall die without making appointment as aforesaid, or if any appointee of such subscriber shall not be entitled to take or upon the termination of the term of any appointment, then said trustee shall from time to time pay the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid, or such portion thereof as shall be affected by such failure to appoint or inability of the appointee to take, or termination of the term of appointment to the issue of such subscriber at the time of distribution proportionately by right of representation.

(D) In case a subscriber shall die without surviving issue, or the issue of a deceased subscriber shall become extinct after the death of such subscriber, and either (1) such subscriber shall not have made appointment as aforesaid, or (2) the appointee shall not be

entitled to take, or (3) the term of appointment shall have expired, then and in either of such events the said trustee thereafter shall pay the net dividends in respect of the stock transferred by such deceased subscriber or that portion thereof affected by either or any of the foregoing contingencies to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation.

Fifth. The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the dissolution of said the Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testimentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes
34 embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

Sixth. In the event that by act of the parties or by operation of law any of the stock of said the Patrick Cudahy Family Company

so assigned and transferred as aforesaid shall be withdrawn from the operation of the primary trust hereby created, said trust shall nevertheless continue in respect of all of said stock not so withdrawn unless and until terminated as herein provided.

Other stock of said the Patrick Cudahy Family Company may be transferred and assigned to said trustee by any or either of the subscribers hereto or their issue and upon being so transferred and assigned shall thereafter be deemed to constitute and form a part of the trust fund hereby created and be in all respects subject to all of the terms and provisions of this instrument.

Seventh. The Wisconsin Trust Company, for itself and its successors in trust, covenants, promises, and agrees that it as said trustee will well, truly, and faithfully execute and perform all and singular the trusts hereinbefore described and hereby reposed in it according to the terms, intent, and meaning of these presents, but said Wisconsin Trust Company shall not be liable for any action or nonaction taken or omitted in good faith and in the exercise of reasonable care, nor for the acts, defaults, or miscarriages of its officers, agents, or employees, provided such officers, agents or employees are selected or employed with reasonable care and diligence.

Eighth. In the event of the dissolution for any cause of said Wisconsin Trust Company, a successor in trust shall be appointed in the manner provided by the laws of the State of Wisconsin which successor in trust shall be a trust company organized under the laws of said State of Wisconsin.

In witness whereof, the said subscribers have hereunto set their hands and seals in duplicate the day and year first above written.

(Signed) PATRICK CUDAHY. [SEAL]
" ANNA M. CUDAHY. [SEAL]
" ELIZABETH C. BECK. [SEAL]
" MARY C. DAHLMAN. [SEAL]
" KATHERINE C. FERNEDING. [SEAL]
" JOSEPHINE C. HOYT. [SEAL]
" IRENE C. HELMHOLZ. [SEAL]
" MICHAEL F. CUDAHY. [SEAL]
" JOHN CUDAHY. [SEAL]

WISCONSIN TRUST COMPANY,

[CORPORATE SEAL] " By OLIVER C. FULLER, *President.*

Countersigned:

DOUGLAS F. MCKEY, *Secretary.*

($209.82 in revenue stamps attached.)

35 *Exhibit B*

This supplemental and amendatory indenture made this 11th day of June 1918 by and between Patrick Cudahy, Anna M. Cudahy, Elizabeth C. Beck, Mary C. Dahlman, Irene C. Helmholz, Katherine

C. Ferneding, Josephine C. Hoyt, John Cudahy, and Michael F. Cudahy, hereinafter designated subscribers, parties of the first part, and Wisconsin Trust Company, a Wisconsin corporation, hereinafter designated trustee, party of the second part.

Witnesseth:

Whereas, the said subscribers have executed an indenture dated June 7, 1918, for the purpose of transferring certain shares of the capital stock of the Patrick Cudahy Family Company to said Wisconsin Trust Company, as trustee, for the uses and purposes therein expressed, which said indenture has not yet executed or accepted by or delivered to said trustee, and which by inadvertence fails to express fully the intentions of the parties hereto,

Now, Therefore, in consideration of the premises, the undersigned parties do hereby agree as follows:

First. That the said indenture of June 7, 1918, and this instrument when both are delivered to and executed and accepted by said Wisconsin Trust Company shall constitute and be construed in all respects as one agreement.

Second. That paragraph (B) of article fourth of said indenture shall be construed to apply to and authorize appointments made only to and for the benefit of natural persons.

Third. That in case any subscriber in and by last will and testament admitted to probate shall direct that the net dividends received in respect of the shares of stock by such subscriber transferred and assigned or any portion thereof be paid to any incorporated or unincorporated charitable organization or be expended for charitable purposes, the said trustee until the termination of the primary trust created by said indenture of June 7, 1918, shall pay or expend the same in accordance with such direction, and upon the termination of said primary trust shall convey and transfer the capital stock of said the Patrick Cudahy Family Company in respect of which the dividends are so directed to be paid or expended and (or) any other capital assets received by said trustee in lieu or in respect thereof to the Wisconsin Trust Company, as trustee, to have and to hold the same upon and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject however to the provisions of the last will and testament of such subscriber insofar as they are not inconsistent with the terms and provisions of said resolution or declaration of trust establishing the Milwaukee Foundation.

Fourth. In the event that by virtue of said indenture of June 7, 1918, or of this instrument capital stock of the Patrick Cudahy Family Company or other securities or assets shall come to the hands of said Wisconsin Trust Company or its successor or
36 successors to be held as trustee after the termination of the primary trust created by said indenture of June 7, 1918, the

trustee is hereby authorized and empowered in its discretion to sell, convey, assign, and transfer or to hold the same in the form in which received or to exchange the same into other forms of investments and securities as to it shall seem best calculated to realize the purposes for which such trust fund shall be held, irrespective of such assets conforming or not conforming to law in respect of the investment of trust funds, and to join and participate in partitions voluntary or judicial of real or personal property included therein. Whenever and if, however, the trustees shall have converted any of said stock or other assets into money, it shall thereafter invest such moneys in conformity to the law regulating the investment of trust funds or as provided in said resolution establishing the Milwaukee Foundation as the case may be.

In witness whereof, the parties of the first part have hereunto set their hands and seals and the party of the second part has caused this instrument to be executed by its president and countersigned by its secretary, and its corporate seal to be hereunto attached, all in duplicate, this 11th day of June 1918.

(Signed) PATRICK CUDAHY. [SEAL]
" ANNA M. CUDAHY. [SEAL]
" ELIZABETH C. BECK. [SEAL]
" MARY C. DAHLMAN. [SEAL]
" KATHERINE C. FERNEDING. [SEAL]
" JOSEPHINE C. HOYT. [SEAL]
" IRENE C. HELMHOLZ. [SEAL]
" JOHN CUDAHY. [SEAL]
" MICHAEL CUDAHY. [SEAL]

WISCONSIN TRUST COMPANY,
[CORPORATE SEAL] " By OLIVER C. FULLER, *President.*
Countersigned:

DOUGLAS F. MCKEY, *Secretary.*

Exhibit 1

PATRICK CUDAHY FAMILY CO.—DIVIDEND RECORD

		Amount per share
Jan. 1, 1909 to Dec. 31, 1909		
" 1910 " " 1910		$1.75
" 1911 " " 1911		6.00
" 1912 " " 1912		6.00
" 1913 " " 1913		4.00
" 1914 " " 1914		4.00
" 1915 " " 1915		4.00
" 1916 " " 1916		2.00
" 1917 " " 1917		4.00
" 1918 " " 1918		5.00
" 1919 " " 1919		5.00
" 1920 " " 1920		8.00
" 1921 " " 1921		
" 1922 " " 1922		
" 1923 " " 1923		
" 1924 " June 30, 1934		

	July 1, 1924	"	"	1925	$13.50
	"	1925	"	1926	20.25
	"	1926	"	1927	21.00
	"	1927	"	1928	21.00
37	"	1928	"	1929	
	"	1929	"	1930	
	"	1930	"	1931	8.50
	"	1931	"	1932	10.30
	Total amount paid per share				144.30
	Average per year (23½ yr.)				6.14

Exhibit 2–A

PATRICK CUDAHY FAMILY CO.,
1015 Railway Exchange Building,
Milwaukee, December 11, 1928.

Mr. W. R. HELMHOLZ,
Helmholz Shoe Mfg. Co., Cudahy, Wisconsin.

DEAR SIR: In response to your letter of October 22, 1928, enclosing Certificate No. 9 for one share of the capital stock of the Patrick Cudahy Family Company, issued in the name of Irene C. Helmholz, and requesting that the same be transferred by the company to W. R. Helmholz, I enclose herewith a copy of the resolution duly adopted by the Board of Directors of the company at a meeting thereof, held on the 4th day of December 1928.

Also please find enclosed check of the Patrick Cudahy Family Company, payable to your order as executor of the estate of Irene C. Helmholz, for $100.00, in accordance with the resolution.

Yours very truly,

PATRICK CUDAHY FAMILY COMPANY,
(Signed) JOHN BANNEN, *Manager.*

Exhibit 2–B

Whereas, the articles of incorporation and bylaws of the Patrick Cudahy Family Company contain the following restriction upon the transfer of the shares of stock of the corporation, to wit:

"SECTION 1. No transfer of stock in this corporation shall be valid except in pursuance of the vote of a majority of all the outstanding shares and before offering the said stock in writing to the board of directors of this corporation at its par value and giving said board of directors ninety (90) days in which to sell said stock at such par value to the then stockholders of the corporation. At the expiration of ninety (90) days if no stockholders have purchased and paid for said stock, such stockholder or stockholders offering to sell shall have the right to sell to anyone whomsoever.

"SECTION 2. All of the shares of this corporation heretofore issued shall be recalled and shall be reissued to the stockholders and such reissued shares shall have imprinted thereon in words or substance section 1 of this article, and such shares as may hereafter be issued shall likewise have so imprinted thereon such section"; and

Whereas, W. R. Helmholz, as executor of the estate of Irene C. Helmholz, deceased, has tendered Certificate No. 9 for one (1) share of the capital stock of said corporation, issued and now outstanding in the name of Irene C. Helmholz, and has demanded that the same be transferred to W. R. Helmholz; and

38 Whereas, the stockholders of this corporation desire that none of said shares of stock shall pass out of the hands of the descendants of Patrick Cudahy, the founder of this company;

Now, therefore, be it resolved by the board of directors of the Patrick Cudahy Family Company that pursuant to the articles of incorporation and bylaws aforesaid, this corporation buy the said share of stock so tendered for the benefit of all the remaining stockholders of the corporation proportionately, and sell the same to said stockholders at the par value thereof, in such proportionate, fractional interests as shall divide the same equally among the stockholders joining in such purchase.

Resolved, further, that the treasurer of the corporation pay to W. R. Helmholz the sum of one hundred dollars ($100.00) for the par value of said share of stock, and that the secretary of the corporation transfer the same upon the books of the company to the stockholders purchasing the same, and issue fractional shares therefor to the stockholders entitled to the same.

[File endorsement omitted.]

In Court of Appeals of the District of Columbia

[Title omitted.]

Praecipe for record

(Filed March 24, 1934)

To the clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the Court of Appeals of the District of Columbia, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals of the District of Columbia, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
3. Findings of fact, opinion, and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Statement of the evidence as settled and allowed.
6. This praecipe.

Service of a copy of the within praecipe is hereby admitted this 22d day of March 1934.

(Signed) ROBERT H. JACKSON,
General counsel, Bureau of Internal Revenue.
(Signed) JAMES QUARLES,
Attorney for respondent.

39 [Clerk's certificate to foregoing transcript omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Order enlarging time

Upon motion of counsel for petitioner, it is

Ordered that the time for preparation of the evidence and for transmission and delivery of the record sur petition for review of the above-entitled proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended to April 30, 1934.

[SEAL] (Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C., March 14, 1934.

Now, April 27, 1934, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[File endorsement omitted.]

40 [Minute entry of argument and submission, Nov. 13, 1934, omitted in printing.]

41 In United States Court of Appeals for the District of Columbia

No. 6219

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WALDEMAR R. HELMHOLZ, AS SOLE DEVISEE AND LEGATEE UNDER THE Will of Irene C. Helmholz, Deceased, respondent

On petition for review of decision of the United States Board of Tax Appeals

(Argued November 13, 1934. Decided December 31, 1934)

Frank J. Wideman, Sewall Key, Robert H. Jackson, and Morton K. Rothschild, of Washington, D. C., for petitioner.

James Quarles, of Washington, D. C., for respondent.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

Opinion

GRONER, *Associate Justice:* This case involves a deficiency assessment of estate taxes on the Estate of Irene C. Helmholz, deceased. Mrs. Helmholz died a resident of Wisconsin in 1927, and the applicable statute is the Revenue Act of 1926 (44 Stat. 9, Secs. 301, 302).

By a trust indenture dated June 7, 1918, and a supplemental indenture dated June 11, 1918, Mrs. Helmholz transferred to a corporate trustee 999 shares of the capital stock of the Patrick Cudahy Family Company, a corporation organized under the laws of Wisconsin. Patrick Cudahy (her father), his wife, and his other children also were parties to the trust agreement and made similar transfers of the same stock.

The trust indenture provides that the trustee shall receive all dividends paid on all the shares of stock transferred to it, and presumably had for its object the retention of this stock in the custody of the family and their descendants. By its terms, each subscriber was entitled to receive during his lifetime his share of the net dividends received in respect of the property contributed by him to the trust estate, and also the right to designate by last will and testament a natural person to whom the dividends should thereafter be
42 paid, but only during the life of the appointee, and with a specific provision that none of the capital stock of the company so transferred to the trustee should be distributed to any such testamentary appointee. If no designation is made by appointment, the dividends after the death of the subscriber are payable to the issue of the subscriber, and in the event of failure of issue, the dividends are payable to the other subscribers equally. At the expiration of the trust, the trustee is required to distribute the corpus of the trust to the issue of the particular subscriber if there is issue; if not, to the issue of the other subscribers, and upon a total failure of all issue to a named charity. The indenture provides that the term of the primary trust shall end "(1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased; or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end; or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company, and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end." The agreement also provides for termination upon the dis-

solution of the Patrick Cudahy Company for any cause provided by law, or upon the extinction of issue of Patrick and Anne Cudahy, they being then dead.

Irene C. Helmholz, by will, made a valid exercise of the power of appointment reserved in the indenture in favor of her husband. The articles of incorporation and by-laws of the Patrick Cudahy Family Company contain a provision forbidding the transfer of any stock in the corporation until the same has been offered to the board of directors for sale to the then stockholders at par, and provide that this condition shall be endorsed in writing on the face of the certificates. The Commissioner treated the shares transferred by Mrs. Helmholz as passing at her death and subject to the estate tax and, in arriving at the amount of the deficiency, valued the stock in the Patrick Cudahy Family Company at $320.00 a share. The Board of Tax Appeals, on the petition of Waldemar R. Helmholz as executor and legatee under the will of Mrs. Helmholz, held against the Commissioner. They said, "In the instant proceeding, Mrs. Helmholz had irrevocably disposed of the corpus of the trust, and that property went to the remaindermen designated in the trust agreement, upon the termination of the trust. She had no power to alter, amend, or revoke the trust instrument that would effect such a disposition as was possible in the Porter case [1] and bring the property within the purview of subdivision (d)."

From the decision of the Board the Commissioner appeals, and in the argument and in the brief the only questions presented and urged are, first, whether the shares of stock which Mrs. Helmholz placed in the trust should be included in her gross estate under section 302 of the Revenue Act of 1926; and if this question is answered in the affirmative, then, second, the value of the stock at the date of Mrs. Helmholz's death. The deficiency found by the Commissioner amounted to $2,653.47.

43 Section 302 (d) of the Revenue Act of 1926 provides that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone, or in conjunction with any person, to alter, amend, or revoke the trust. Relying on this section, the Commissioner tells us that under the trust agreement there were listed a number of contingencies, any one of which might have occurred, under which the trust would terminate. In such event, the Commissioner says, the corpus was to revert to the settlors. Therefore, he says, none of the remainder beneficiaries had the enjoyment of the property during the life of the settlor, and none acquired by the indenture the absolute and unconditional right to future possession and enjoyment. But we are

[1] Porter v. Commissioner, 288 U. S. 436.

unable to follow the Commissioner's argument in this respect, and we think it perfectly obvious, as the Board found, that in the trust agreement Mrs. Helmholz divested herself completely of legal title to the shares contributed by her to the trust estate and merely reserved a life interest in the income and a limited power of appointment respecting it; and if we are correct in this conclusion, it follows that the value of the shares of stock which she transferred to the trust some nine or ten years before her death could not legally be included in determining the amount of her estate. Nor do we find anywhere in the trust agreement a power to revoke its provisions or to change its terms or to cancel it. The trust instrument defines not the revocation, but the duration of the trust. As to the latter, however, it provides no more than that it shall end upon the happening of certain named incidents, none of which the decedent could control; that is to say, first, upon the death of the last surviving grandchild of the parents of Mrs. Helmholz, an event which could not be determined while Mrs. Helmholz lived, and which consequently carried the duration of the trust beyond the period of her life and made immediately effective the rights and interests of her "issue" if she had any, or the right of the other settlors or their issue to take, if she left no issue; second, upon a writing signed by all the then beneficiaries (other than testamentary appointees). Obviously, this gave no power to Mrs. Helmholz to revoke the trust. Granted she became, by virtue of the reservation of a life estate in the income, one of the beneficiaries, she is only one. Her issue, if she has any, from the moment of the making of the trust, are potential beneficiaries. Her father and mother, as well as her brothers and sisters, are likewise potential beneficiaries, and so is the issue of all of them. And nothing is better settled under the statutes, as of the time we are speaking, than the proposition that where the revocation of a trust depends for its exercise upon the assent of the beneficiaries, it is not within the statute. On the contrary, where the transfer is complete and its terms fixed, the properties are not made subject to tax because of passing of title from life tenant to remainderman at or after the settlor's death. United States v. Wells, 283 U. S. 102; Bromley v. McCaughn, 280 U. S. 124.

44 The trust agreement as a whole clearly shows that no one of the subscribers can take any action to terminate the trust or retake his or her contribution to the trust, without the assent and cooperation of all, and this is enough to make the transfer absolute as of the date of the agreement. See Reinecke v. Trust Co., 278 U. S. 339. In that case the decedent had created five trusts, one for his wife and his four children, and one for each of the four children. The instrument provided that the settlor might alter, change, or modify in any respect and to any extent at any time, the trusts for the benefit of the children with the consent of the beneficiary therein, and the trust for the benefit of the wife and children with the consent of a majority of the beneficiaries. The Commissioner there

claimed that these provisions, and others not found in the instrument here in review, brought the trusts within the provisions of the Revenue Act of 1921 (substantially identical with the Act of 1926). But the Supreme Court, speaking of the power reserved in the settlor, said, "He could not effect any change in the beneficial interest in the trusts without consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust, without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." This case was followed by McCormick v. Commissioner, 283 U. S. 784. In that case Mrs. McCormick established a trust for her three children and their descendants. The trust was to terminate on the death of the survivor of the three children. It could be terminated earlier, (1) while she lived by a writing signed by her and any child, and (2) after her death by a writing signed by a majority of her beneficiaries of lawful age. If the trust were terminated, the properties reverted to her if she were alive; otherwise they went one-third to each child, if then living, etc. The Supreme Court, following the Reinecke case, overruled the contentions of the Commissioner and held in effect the trust was an inter vivos transfer and not subject to tax.

In the case of Dort v. Helvering, 69 F. (2d) 836, decided by us within the year, we were dealing with a case involving the reserved right to change the beneficial interests. In that case the question of the revocation of the trust was not involved, nor was the power to change dependent upon the consent of the beneficiary; all that we decided there was that the right to "change" which was reserved, involved the right to appoint new or different beneficiaries rather than, as was contended, only the mechanics of the trust. It is not, therefore, as the Commissioner claims, authority in the present case. Here the question is not the power to alter or amend, but the power to revoke, and since that power—if it exists at all—is subject to the concurrence of others whose interests are antagonistic, it is a bootless right which, so long as it is unavailed of, leaves the property of the trust outside the provisions of the statute. And this is so, as the Supreme Court said in the Reincke case, because the decedent being without power to terminate the trust, the trust indenture and not the death is the generating source of the interests that came into enjoyment and possession at decedent's death.

45 The Board held, also, that the life interest in the income of the trust estate passing to respondent should not be included in the gross estate of decedent under sec. (f) of 302. The Board's holding was grounded on the fact that the reserved power of appointment was a special and not a general power. We have not

considered the question on this appeal, for it is not raised by any of the assignments of error, nor was it argued or insisted on in brief or oral argument.

Affirmed.

A true copy.
Teste:

Clerk, United States Court of Appeals for the District of Columbia.

46 In United States Court of Appeals for District of Columbia

No. 6219. October term, 1934

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WALDEMAR R. HELMHOLZ AS SOLE DEVISEE AND LEGATEE UNDER THE Will of Irene C. Helmholz, Deceased

Judgment

December 31, 1934

Petition for review from the Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

(Per) MR. JUSTICE GRONER.

DECEMBER 31, 1934.

47 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed March 20, 1935

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. The printed record.
2. The argument.
3. Opinion.

4. Decision.
5. This designation.
6. Clerk's certificate.

J. CRAWFORD BIGGS, *Solicitor General.*

[File endorsement omitted.]

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is assigned for argument immediately following the hearing of no. 805.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39455. U. S. Court of Appeals, District of Columbia. Term No. 14. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Waldemar R. Helmholz, as Sole Devisee and Legatee under the Will of Irene C. Helmholz, deceased. Petition for a writ of certiorari and exhibit thereto. Filed March 30, 1935. File No. 14 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. [illegible]

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WALDEMAR R. HELMHOLZ, AS SOLE DEVISEE AND legatee under the will of Irene C. Helmholz, deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above cause on December 31, 1934, affirming a decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12) is reported in 28 B. T. A. 165. The opinion of the United States Court of Appeals for the District of Columbia is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 31, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent and other members of her family transferred certain stock to a trustee, to pay to each of the several settlors for life the dividends in respect of the shares transferred by the respective settlors, with certain remainders over. The trust instrument provided that the trust would terminate upon the delivery to the trustee of a written instrument signed by all of the then beneficiaries declaring the trust term at an end. The questions presented are:

1. Whether the stock transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the stock was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> (U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 12–16) may be summarized as follows:

The respondent is the administrator and sole beneficiary of the estate of Irene C. Helmholz, a resident of Wisconsin, who died in 1927 (R. 12–13). In 1918 the decedent and other members of her family executed an agreement whereby they conveyed certain stock of the Patrick Cudahy Family Company in trust to pay to each subscriber for life the dividends in respect of the shares transferred by the subscriber; and upon the death of each subscriber, to pay the dividends to such person or per-

sons for life as the subscriber might by will appoint; and upon failure of appointment or upon expiration of the term of appointment, then to pay the dividends to the issue of such subscriber at the time of distribution (R. 13-14).

The trust agreement provided in part as follows (R. 33-34):

> Fifth. The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.
>
> The term of the primary trust hereby created shall also terminate upon the dissolution of said the PATRICK CUDAHY FAMILY

COMPANY in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to hold and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

The decedent left a will, which was admitted to probate, and in which she bequeathed all her prop-

erty to her husband, the respondent (R. 14). The Supreme Court of Wisconsin construed the will as a valid exercise by the decedent of the power of appointment reserved in the trust agreement (R. 17).

The articles of incorporation and bylaws of the Cudahy Company provided that no transfer of stock should be valid except in pursuance of the vote of a majority of the shares and before offering the stock in writing to the board of directors for purchase at par value (R. 14–15). The Commissioner determined that the entire value of the Cudahy stock should be included in the decedent's gross estate under Section 302 (c) and (d) of the Revenue Act of 1926 and that the stock should be valued at $320 per share. The taxpayer appealed to the Board of Tax Appeals, which decided that the property should not be included in the decedent's gross estate because it was not within the terms of Section 302 (c), (d), or (f), and that the stock should be value at $100 per share.

The parties stipulated that the decision of the Board of Tax Appeals might be reviewed by the United States Court of Appeals for the District of Columbia (R. 23–24), which decided that the corpus of the trust should not be included in the gross estate of the decedent under Section 302 (c) or (d) of the Revenue Act of 1926 and did not pass upon the question as to the value of the stock which the decedent transferred in trust.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to determine that the enjoyment of 999 shares of Patrick Cudahy Family Company stock was subject to change at the death of the decedent through the exercise of a power by the decedent in conjunction with others to alter, amend, or revoke, within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926 which are also involved in *Helvering* v. *City Bank Farmers Trust Co.*, No. 805, October Term, 1934, in which the Government is seeking certiorari to the United States Circuit Court of Appeals for the Second Circuit. In addition to the reasons set forth in our petition in the *City Bank Farmers Trust Co.* case, *supra,* the Assistant General Counsel for the Bureau of Internal Revenue advises that there are twelve cases pending in his office involving the construction of Section 302 (d) of the Revenue Act of 1926 and that the approximate amount of tax involved is $347,000. We have also been advised that there are fifty-five such cases pending in the Estate Tax Division of the Tax Unit involving approximately $4,500,000.

For the reasons set forth in our petition in the *City Bank Farmers Trust Co.* case, *supra*, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MARCH 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 14

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WALDEMAR R. HELMHOLZ, AS SOLE DEVISEE AND LEGATEE UNDER THE WILL OF IRENE C. HELMHOLZ, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–24) is reported in 28 B. T. A. 165. The opinion of the United States Court of Appeals for the District of Columbia (R. 41) is reported in 75 F. (2d) 245.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 31, 1934. (R. 46.) Petition for writ of

certiorari was filed March 30, 1935, and was granted April 29, 1935. (R. 47.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent and other members of her family transferred certain stock to a trustee, to pay to each of the several settlors for life the dividends in respect of the shares transferred by the respective settlors, with certain remainders over. The trust instrument provided that the trust would terminate upon the delivery to the trustee of a written instrument signed by all of the then beneficiaries declaring the trust term at an end. The questions presented are:

1. Whether the stock transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926, because the enjoyment of the stock was subject, at the date of her death, to change through the exercise of a power by the decedent in conjunction with other persons to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by includ-

ing the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.

(U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 13) may be summarized as follows:

The respondent is the administrator and sole beneficiary of the estate of Irene C. Helmholz, a resident of Wisconsin, who died in 1927. (R. 13.) In 1918 the decedent and other members of the Cudahy family executed an agreement whereby they conveyed certain stock of the Patrick Cudahy Family Company in trust to pay to each subscriber for life the dividends in respect of the shares transferred by the subscriber; and upon the death of any subscriber, to pay the dividends to such person or persons for life as the subscriber might by will appoint; and upon failure of appointment or upon expiration of the term of appointment, then to pay the dividends to the issue of such subscriber at the time of distribution, and if no issue of such sub-

scriber, then to the surviving subscribers or their issues living at the time of distribution. (R. 13–14.)

The trust agreement provided in part as follows (R. 35):

> Fifth. The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.
>
> The term of the primary trust hereby created shall also terminate upon the dissolution of said the Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trus-

tee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

The decedent left a will, which was admitted to probate, and in which she bequeathed all her property to her husband, the respondent. (R. 14–15.) The Supreme Court of Wisconsin construed the

will as a valid exercise by the decedent of the power of appointment reserved in the trust agreement. (R. 18.)

The Commissioner determined that the entire value of the Cudahy stock should be included in the decedent's gross estate under Section 302 (c) and (d) of the Revenue Act of 1926 and that the stock should be valued at $320 per share. The taxpayer appealed to the Board of Tax Appeals, which decided that the property should not be included in the decedent's gross estate, because it was not within the terms of Section 302 (c), (d), or (f), and that the stock should be valued at $100 per share.

The parties stipulated that the decision of the Board of Tax Appeals might be reviewed by the United States Court of Appeals for the District of Columbia (R. 25), which decided that the corpus of the trust should not be included in the gross estate of the decedent under Section 302 (c) or (d) of the Revenue Act of 1926 and did not pass upon the question as to the value of the stock which the decedent transferred in trust.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to determine that 999 shares of Patrick Cudahy Family Company stock was taxable as a part of decedent's gross estate because en-

joyment thereof was subject to change at the death of the decedent through the exercise of a power by the decedent in conjunction with others to alter, amend, or revoke, within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In affirming the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the precise question involved in *Helvering* v. *City Bank Farmers Trust Co.*, No. 10, October Term, 1935; and *White* v. *Poor*, No. 36, October Term, 1935, pending before this Court. In the interest of brevity, the petitioner adopts and incorporates herein by reference the argument presented under points "I" and "II" in the brief filed on behalf of the petitioner in *Helvering* v. *City Bank Farmers Trust Co., supra;* and the brief filed on behalf of the petitioner in *White* v. *Poor, supra.*

The trust agreement provided that the term of the trust should end upon delivery to the trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring the trust term at an end.

We submit, therefore, that the instant case comes within Section 302 (d) of the Revenue Act of 1926, *supra,* and that when applied to the facts of the instant case, the provisions of the section are not unconstitutional.

CONCLUSION

We respectfully submit that the decision of the court below is erroneous and should be reversed.

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SEPTEMBER 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

WALDEMAR R. HELMHOLZ, as sole devisee and legatee under the Will of IRENE C. HELMHOLZ, deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR THE RESPONDENT.

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No. 827.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

WALDEMAR R. HELMHOLZ, as sole devisee and legatee under the Will of IRENE C. HELMHOLZ, deceased,
Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals is at pages 12-23 of the Record and is reported in 28 B. T. A. 165.

The opinion of the United States Court of Appeals for the District of Columbia is at pages 41-45 of the Record and is reported in 75 F. (2) 245.

The Statute.

The case arises under section 302 of the Revenue Act of 1926 (C. 27, 44 Stat. 9). So far as the petition for certiorari, on its face, is concerned only sub-section (d) of

section 302 is involved; yet, as we see the case, sub-section (f) also is involved, though perhaps only collaterally. Section 302, (d) and (f), provide:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——
>
> * * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> * * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *.

Questions.

The petition presents the question as to whether subsection (d), *supra*, requires that certain stock which was transferred by the decedent to a trustee nine years prior to her death should be included in her gross estate for purposes of the Estate Tax. More specifically it is, (a) whether certain words in the instrument creating the trust merely define the duration of the trust or are to be treated as provisions for its revocation, and (b), if the latter, whether they amount in the effectual and legal sense to provisions for revocation, since such revocation is dependent upon the consent of the beneficiaries.

The Board of Tax Appeals and the Court of Appeals for the District of Columbia held the trust irrevocable.

The Facts.

Chronologically and very briefly stated, the facts as found by the Board of Tax Appeals, are as follows:

By an instrument dated and executed June 7, 1918, the decedent, Irene C. Helmholz,—her father and mother and her sisters and brothers also being parties and making similar transfers—transferred 999 shares of stock in The Patrick Cudahy Family Company to a trustee, the latter to receive from time to time the dividends paid on the stock and, after deducting the expenses of administration, to distribute the net amount (a) to herself for life, (b) remainder to her appointee by will for life, and (c) remainder to her issue.

The instrument provided that no appointment should be for longer than the natural life of the appointee (R. 32), and, excepting corporations organized for charitable purposes, that appointments should be made only to natural persons (R. 35).

The instrument further provided, in paragraph (D), that in case a settlor, or "subscriber," should die without surviving issue, and in any one of several other specified events, the trustee should pay the dividends received by it in respect of the stock deposited by such deceased settlor "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation" (R. 33).

Regarding the termination of the trust, it was provided:

> Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of The Patrick Cudahy Family Company, and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said The Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereon other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.
>
> The term of the primary trust hereby created shall also terminate upon the dissolution of said The Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

> The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said The Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided (R. 33-34).

Irene C. Helmholz died October 19, 1927, leaving a will by which she devised and bequeathed her property to her husband, Waldemar R. Helmholz, the respondent. The will was held by the Wisconsin courts to have been a valid exercise of the power of appointment reserved in the trust instrument (R. 17).

Argument.

Counsel for the Commissioner has undertaken to yoke together this case and *Commissioner* v. *City Bank Farmers Trust Co.*, No. 805, and on the present petition has submitted one brief for the two. He also states that sixty-seven other cases are pending in the Bureau of Internal Revenue involving the construction of section 302(d) of the Revenue Act of 1926. Despite, however, this apparent effort of counsel to have the Court deal with these cases

en masse, or at least to view the situation as one presenting a novel question common to all of them, we are entirely confident that each of the two cases now before it on petitions for certiorari will be disposed of solely upon the basis of its own facts; and, further, that in doing so the Court will give scant weight to the circumstance that other section 302(d) cases, each, of course, with juridical features peculiar to itself, are pending in the bureau. That condition probably has existed ever since the section was enacted and doubtless will continue as long as the statute remains on the books.

The real reason back of the present petition and the accumulation of other cases, we venture very respectfully to suggest, is not so much a doubt as to what the law is as it is the proverbial inability of the tax collector to view a tax question from but one angle, plus an unyielding reluctance on the part of the ~~respondent~~ petitioner and his predecessors to accept the common-sense interpretation which this Court and various intermediate appellate courts have placed upon the statute.

Duration, Not Revocation, Import of Language Used.

No power whatever to "alter or amend" the trust is reserved in the indenture. A brief supplementary agreement was executed by the voluntary action of all the settlors, but that was before the original instrument had been executed by or delivered to the trustee (R. 35).

Furthermore, in form at least, there is no provision at all in the instrument for a *revocation* of the trust, since the language used simply defines the *duration* of the trust as distinguished from a revocation of it before it has run the allotted time. The words of the indenture are:

> The term of the primary trust hereby created *shall end* (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust at an end • • • (R. 33).

Besides, although not deemed at all essential to the application of the principle enunciated by this Court in the case cited under the heading next following, yet it seems germane at this point to refer to the provision, already quoted, that, in the event a subscriber dies leaving no issue surviving, the dividends of such subscriber shall be paid "to the surviving subscribers or their issue living at the time of distribution." It thus is clear that each subscriber, not only as regards himself or herself but also as regards his or her issue, has a direct and very substantial interest in the *continuance* of the trust agreement, and hence is to be presumed to decline cooperation with any subscriber who might propose its termination.

As Beneficiaries Must Consent, Trust Not Revocable.

However, even treating the provisions in paragraph "Fifth" of the indenture as though they stipulated in so many words for a power of revocation, every one of them —except the first, which obviously is no provision for revocation—requires for the exercise of the power the cooperation of other subscribers and beneficiaries. That fact, we submit, renders the trusts absolute and irrevocable in the eyes of the law.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, decided more than six years ago, it was, upon full consideration and

for a reason whose validity would seem incontrovertible, definitely held that where the power to revoke a trust is contingent upon the consent of the beneficiary it does not amount to a power of revocation at all. Speaking for a unanimous Court, Mr. Justice Stone, at page 346, said:

> Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

By the terms of the trust instrument in the case at bar, not only are the issue of each settlor made beneficiaries *quoad* that settlor's interest, but under subdivision (D) of paragraph "Fourth" of the indenture (R. 33) each settlor and each settlor's issue is constituted a potential beneficiary of every other settlor's interest. Moreover, the whole plan obviously was designed by the father to unify and to continue in his descendants as far as possible the ownership of the estate he had accumulated. Consequently but little freedom of action was allowed any individual "subscriber." He or she could exercise a restricted power of testamentary appointment, and that was all that any of them, acting singly, was permitted to do under the provisions of the agreement.

The Revenue Act of 1921 was the one under consideration in *Reinecke* v. *Northern Trust Co., supra.* Whilst that Act contained no provision corresponding to section 302 (d) of the Act of 1926, here involved, and whilst the question there arose with reference to the provision covering interests "intended to take effect in possession or enjoyment at or after death," yet the principle laid down obvi-

ously is as applicable here as it was there. Seven separate trusts were involved. Counsel for the Commissioner contended that the power of revocation reserved by the settlor did not cease until his death, and hence that the latter event was the point at which the transfer actually took place. This Court sustained that contention with respect to two of the seven trusts, however, upon the distinct ground that as to those two "there was reserved to the settlor *alone* a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him." But as to four of the other five trusts the power of revocation could not be exercised without the consent of the beneficiaries, and as to the remaining trust without the consent of a majority of the several beneficiaries, and it was held that none of those five trusts was includable in the decedent's gross estate, because of that vital difference between them and the two other trusts.

Manifestly, the whole point of the decision was and is, that where a trust can be revoked only with the consent of the beneficiary the nominal power of revocation is thereby so neutralized as, in contemplation of law and also as a practical matter, to be treated as non-existent. The principle, we submit, is as applicable and controlling here as it was held to be there; for if a qualifying clause in a provision purporting to reserve the right of revocation takes from the provision its essence and vitality as a revocatory stipulation, then necessarily the provision becomes unavailable in any connection in which the existence of the power of revocation is essential.

The construction put upon section 302 (d) by the Board of Tax Appeals and by the Court of Appeals for the District of Columbia was placed upon it also in *White* v.

Erskine (C. C. A. 1), 47 F. (2) 1014, *Lit* v. *Commissioner* (C. C. A. 3), 72 F. (2) 551, and *White* v. *Poor* (C. C. A. 1), 75 F. (2) 35.

Counsel, at page 14 of their brief, state that the reasoning of the Court of Appeals for the First Circuit in *White* v. *Erskine, supra,* "was repudiated by this Court in *Porter* v. *Commissioner,*" 288 U. S. 436. Quite true, but not on the point here involved, for the questions presented in the two cases, respectively, as an attentive reading of the opinions will show, were altogether different. In the *Porter Case* the settlor had reserved the right to "modify or alter" without the consent of anybody, whereas in *White* v. *Erskine* the trustee's consent was required. However, the conflict of view to which counsel refers did not relate to that difference but to another question entirely, namely, as to whether sub-section (d) was restricted in its operation by the terms of sub-section (a). The Court of Appeals had held in *White* v. *Erskine* that it was so restricted, but this Court, in the *Porter Case,* held that (d) was an addition to rather than a sub-division of (a) and therefore stood by itself.

Congress Has Concurred in View Expressed by Court in *Reinecke* v. *Northern Trust Co.*

Although several revenue Acts have been passed since the decision in *Reinecke* v. *Northern Trust Co.* was rendered, which was in 1929, in not one of them has Congress seen fit to undertake to obviate the Court's ruling in that case by providing that the trust shall be deemed and treated as revocable notwithstanding the terms of the instrument may require the consent of the beneficiary to such revocation. It seems clear, therefore, that the legislative branch accepts the view expressed by this Court in that case as

being sound and just, and perhaps also as marking the limit of constitutional safety respecting the exercise of the taxing power in such matters. As to the latter we cite *Nichols* v. *Coolidge*, 274 U. S. 531, 542, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348.

Indeed, Congress itself, even prior to *Reinecke* v. *Northern Trust Co., supra*, had formally adopted and incorporated in tax legislation the principle and policy that the transfer should not be taxable where the power of revocation is subject to the consent of the beneficiary. For example, in sub-section (g) of section 219 of the Revenue Act of 1924 it was provided, regarding the tax on the income of estates and of property held in trust, that it should apply, *inter alia*, to cases "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person *not a beneficiary of the trust*, the power to revest in himself title to any part of the corpus * * *." And the italicized qualification was carried into all subsequent Acts, namely, those of 1926 (Sec. 219 (g)); 1928 (Sec. 166); 1932 (Sec. 166, where the language of the qualification was somewhat broadened to read "not having a substantial adverse interest"); and 1934 (Sec. 166).

Amendment of Section 302 (d) by Revenue Act of 1934 Conclusive as to Congressional Intent.

Referring to the 1934 Act, we respectfully submit that nothing short of convincing significance is to be accorded the fact that although, by section 401 of that Act, section 302 (d) of the Revenue Act of 1926 was amended and enlarged in certain particulars, yet no provision whatever was inserted requiring trust property to be included in the

gross estate of the decedent where the exercise of the power of revocation hinges upon the consent of the beneficiary. This fact, we submit, precludes any other view than that Congress is quite content, so far as that point is concerned, to let sub-section (d) continue to be construed and administered in the light of this Court's decision in *Reinecke* v. *Northern Trust Co., supra*, and in the light of the several other later decisions of lower appellate courts holding expressly that section 302 (d) does not apply where the beneficiary's consent to the revocation must be obtained.

Sub-section (f) of Section 302 Governs as to Respondent's Equitable Life Interest.

Perhaps this feature is not presented by the petition for certiorari. Nevertheless, it seems to us to be one which should be kept in mind.

Sub-section (f) of section 302 of the Revenue Act of 1926, so far as pertinent here, reads:

> (f) To the extent of any property passing under a *general* power of appointment exercised by the decedent (1) by will, * * * (R. 32).

The trust agreement provides that "No appointment hereunder shall be effective for a longer period than *the natural life* of the appointee," and the supplemental agreement says that appointments shall be made only to *natural* persons or corporations or organizations created for charitable purposes (R. 35). These restrictions clearly render the power a special and limited one, since sections 232.05 and 232.06 of the *Wisconsin Statutes* define a *general* power as one which authorizes an alienation *"in fee * * * to any alienee whatever,"* and a *special* power as one which author-

izes an alienation "of a particular estate *or interest less than a fee.*".

These provisions of the statute apply to personal property also (*Cawker* v. *Dreutzer* (Wis.), 22[illegible] N. W. 401, 413). See also *Leser* v. *Burnet* (C. C. A. 4), 46 F. (2) 756, 758.

If, therefore, the equitable life interest of the respondent is to be included in the gross estate of the decedent, it must, we submit, be by virtue of sub-section (f), and by virtue of that sub-section only, since it is elementary in the law of statutory construction that the general provisions of a statute yield to provisions which deal specifically with one phase of the general subject to which the statute as a whole relates. It was definitely so held by this Court in *United States* v. *Chase*, 135 U. S. 255, 260.

See also *Caldwell* v. *Steinfeld* (C. C. A. 9), 294 F. 270, and *Old Dominion Land Co.* v. *United States* (C. C. A. 4), 296 F. 20. *Porter* v. *Commissioner*, 288 U. S. 436, which holds in effect that each of the sub-sections of section 302 rests upon its own bottom, also would seem in point.

In consideration of all which, we ask that the petition for the writ of certiorari be denied.

Respectfully submitted,

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April, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 14

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

WALDEMAR R. HELMHOLZ, As Sole Devisee and Legatee Under The Will Of Irene C. Helmholz, Deceased,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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GUY T. HELVERING, Commissioner of Internal Revenue,
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WALDEMAR R. HELMHOLZ, As Sole Devisee and Legatee Under The Will Of Irene C. Helmholz, Deceased,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

NATURE OF THE CASE.

The case involves a deficiency assessment of Estate Taxes on the estate of Irene C. Helmholz, deceased. The deficiency alleged is based upon the transfer of certain shares of stock by the decedent to a trustee, nine years before her

death. The stock so transferred was valued by the Commissioner at $319,680. and the deficiency tax assessed was $13,267.34, subject, however, to a credit by reason of inheritance taxes paid the State of Wisconsin.

The Commissioner determined that the entire corpus of the trust should be included in the gross estate of the decedent, resting his decision upon Section 302, sub-sections (c) and (d), of the Revenue Act of 1926. (R. 8-11)

On petition of the taxpayer to the Board of Tax Appeals for a redetermination, the Commissioner's ruling was reversed, the Board holding that no part of the trust estate was subject to the tax. (R. 12-24)

The Commissioner filed a petition for review by the United States Court of Appeals for the District of Columbia, which court affirmed the decision of the Board of Tax Appeals. (R. 42-46)

The Commissioner then petitioned this Court for the writ of certiorari, which was granted. (294 U. S. VII) The granting of the writ, however, we venture to think, was done largely as a matter of course, since the Court of Appeals for the Seventh Circuit had in *Commissioner* v. *Strauss*, 77 F. (2) 401, just construed the statute involved in a way contrary to the construction given it by the Court of Appeals for the District of Columbia, in this case, and also by the Court of Appeals for the First and Second circuits, in cases recently decided by those courts. Parenthetically, we wish to state that we were unaware of the decision in the *Strauss Case* at the time our short brief in opposition to granting certiorari in the present case was prepared and filed else, of course, it would have been referred to. The case had not then appeared in any of the usual publications.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 12-24) is reported in 28 B. T. A. 165, and the opinion of the United States Court of Appeals for the District of Columbia (R. 42) is reported in 75 F. (2) 245.

STATUTE INVOLVED.

The decedent died October 19, 1927, and the case therefore is governed by the Revenue Act of 1926. (c27, 44 Stat. 9.) According to the petition for certiorari and the specification of errors, in the brief of opposing counsel, only subsection (d) of section 302 of that Act is involved; yet, for reasons hereinafter stated, we quote the provisions of subsection (f) also. Section 302, sub-sections (d) and (f), read:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> • • • • • • • • • •
>
> (d) To the extent of any interest therein of the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke • • •.
>
> • • • • • • • • • •
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will • • •.

STATEMENT OF FACTS.

The facts as found by the Board of Tax Appeals (R. 13-16) are as follows:

By a trust indenture dated and executed June 7, 1918 (R. 32), which was amended and supplemented four days later and before execution of the original by the trustee (R. 36), the decedent, Irene C. Helmholz, transferred 999 shares of stock in The Patrick Cudahy Family Company to a trustee. Her father and mother and her brothers and sisters also

were parties to the two instruments and made similar transfers. The indenture provides that the trustee shall receive from time to time the dividends paid on the 999 shares of stock and, after deducting the expenses of administration, shall distribute the net amount (a) to Irene C. Helmholz for life, (b) remainder to her appointee by will for life, and (c) remainder to her issue.

The indenture provides that no appointment shall be for longer than the life of the appointee (R. 34), and, excepting corporations organized for charitable purposes, that appointments shall be made only to natural persons. (R. 37)

The indenture further provides, in paragraph D, that in case a settlor, or "subscriber", should die without surviving issue, and in any one of several other named events, the trustee shall pay the dividends received by it in respect of the stock deposited by such deceased settlor "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation." (R. 35)

Regarding the termination of the trust, it is provided:

Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of The Patrick Cudahy Family Company, and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said The Patrick Cudahy Family Company to the beneficiaries then entitled to

receive the net dividends thereon other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the dissolution of said The Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets or shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said The Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

Mrs. Helmholz left a brief will by which she devised and bequeathed her property to her husband, Waldemar R.

Helmholz, the respondent in this cause. (R. 15) The will was duly admitted to probate, and also was held by the Wisconsin courts to have been a valid exercise of the power of appointment reserved in the trust indenture. (R. 18) *First Wisconsin Trust Co.* v. *Helmholz*, 198 Wis. 573.

QUESTIONS PRESENTED.

As we understand the position of counsel for the Commissioner, it is contended by them that the stipulations of the trust indenture relating to the termination of the primary trust bring the case within the provisions of subsection (d) of Section 302 of the Revenue Act of 1926. They say it is immaterial that under the terms of the indenture all the beneficiaries must consent before there can be a termination, because, as they maintain, the words, "in conjunction with any person", in subsection (d), include persons who are beneficiaries as well as those who are not.

We deny the validity of that contention.

Further, as to the equitable life interest held by the surviving husband we contend, first, that it is governed by sub-section (f) and not by sub-section (d), since he acquired that interest by the exercise on the part of his wife of a power of appointment; but, second, that it is not includable in the gross estate of the decedent, because the power of appointment was a *special* one, whereas sub-section (f) applies only to property passing under a *general* power of appointment.

OUTLINE OF ARGUMENT.

We respectfully submit the following propositions:

First. That, as the beneficiaries must consent to any revocation, the trust is irrevocable for all practical purposes, and hence also in contemplation of law.

Second. That the history of legislation since the decision rendered by this Court in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, holding that a power of revocation which is dependent for its exercise upon the

consent of the beneficiary does not amount in law to a power of revocation at all, shows conclusively that Congress concurs in that view and intended that sub-section (d) of Section 302 should be construed as not applying to such a case.

Third. That Section 302(d) of the Revenue Act of 1926, if construed and applied as contended for by counsel for the petitioner, would be unconstitutional.

Fourth. That, irrespective of what construction may be placed upon sub-section (d), the equitable life interest held by the surviving husband of the decedent passed to him in virtue of the exercise of a power of appointment and hence is governed by sub-section (f). And that inasmuch as sub-section (f) requires that property passing under the exercise of a general power of appointment only shall be included in the gross estate of the decedent, the equitable life interest is not includable since it passed by reason of the exercise of a special power.

ARGUMENT.

Before entering upon the argument a preliminary observation or two seems in order.

In the brief for the Commissioner it is stated (p. 7) that this case presents the "precise" question involved in Nos. 10 and 36, of the present term. That all three cases call for the construction of sub-section (d) of Section 302 of the Revenue Act of 1926 doubtless is true, but strict analogy certainly ends there. Each case involves its own trust instrument and other facts peculiar to itself, in view of which the use of the word "precise" hardly seems appropriate. We, know, of course, that the Court will consider and determine each case solely upon the basis of its own facts, yet we feel that the indiscriminate grouping and the virtual blanketing under one brief by our esteemed opponents should not pass without this word of comment from us. Of course, not the slightest disparagement of the merits of the other two cases is intended by the observation.

As the Consent of Beneficiaries is Necessary, the Trust Was Irrevocable and Hence Not Within the Provisions of Section 302(d).

No power whatever to "alter or amend" the trust is reserved in the indenture. The amendment of June 11, 1918, was by voluntary action of the settlors, and before the original instrument had been executed by or delivered to the trustee. (R. 36)

Moreover, in form at least, there is no provision at all in the trust indenture for a *revocation*, since the language used simply defines the *duration* of the trust as distinguished from a revocation of it before it has run the allotted time. The words of the instrument are, "The term of the primary trust hereby created *shall end* (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end," and so forth. (R. 35)

However, even treating these provisions as though they stipulated in so many words for a power of revocation, every one of them,—except the first, which manifestly is no provision for revocation,—requires for its exercise the cooperation of other persons besides the settlor. And all those other persons are beneficiaries.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, it was, upon full consideration and for a reason whose validity would seem incontrovertible, definitely held that where the power to revoke is contingent upon the consent of the beneficiary it does not amount to a power of revocation at all. Speaking for a unanimous Court, Mr. Justice Stone, at page 346, said:

> If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two

trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of the four trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. *Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.* (Our italics)

Nor, we submit, is it a valid objection to the application of the foregoing to the instant case, that here the beneficiary is also settlor, for the fact remains, nevertheless, that she could do nothing in the matter of terminating the trusts without the co-operation of all the other beneficiaries; and it cannot be said, of course, that all, or that any, of the latter would consent. Reasons easily might exist, in fact did exist, for not so consenting. The whole scheme obviously was designed by the father to unify and to continue in his descendants as far as possible the ownership of the estate he had accumulated; consequently but little latitude was allowed any individual "subscriber." He or she could exercise a restricted power of testamentary appointment, and that was all that any of them, acting singly, was permitted to do under the terms of the trust instrument.

In the trust agreement there are provisions for the termination of the trusts, but not one of them is available to one settlor without the co-operation of the others. And as unity and solidarity are outstanding features of the agreement, indeed its basic feature, all presumptions must be strongly against any consent to allow one subscriber to withdraw.

But this latter proposition rests upon an even firmer foundation. In fact, we submit that it is put beyond all question by a provision of the trust agreement itself, for in paragraph (D) it is stipulated that in case a subscriber shall die without surviving issue, and in any one of several

other specified events, the trustee shall pay the net dividends received by it in respect of the stock deposited by such subscriber *"to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation"*. (R. 35)

It thus is clear that each subscriber, not only as regards himself or herself but also as regard his or her issue, has a direct and very substantial interest in the *continuance* of the trust agreement, and hence is to be presumed to decline co-operation with any subscriber who might propose its termination.

These considerations, however, really are superfluous, since under the common-sense ruling of this Court in *Reinecke* v. *Northern Trust Co., supra,* there is a presumption of law as well as of fact that a beneficiary of a trust will not consent to its revocation. See *Reinecke* v. *Smith,* 289 U. S. 172, 176, where the doctrine of *Reinecke* v. *Northern Trust Co.* virtually is reaffirmed; also *Lit* v. *Commissioner* (C. C. A. 3) 72 F. (2) 551, where the interest of one beneficiary was held non-taxable and the interest of another beneficiary was held taxable, because under the terms of the trust the consent to a revocation was required as to the first but not as to the second.

The Revenue Act of 1921 was the one under consideration in *Reinecke* v. *Northern Trust Co., supra.* Whilst that Act contained no provision corresponding to section 302(d) of the Act of 1926, here involved, and whilst the question there arose with reference to the provision covering interests "intended to take effect in possession or enjoyment at or after death," yet the principle laid down obviously is as applicable here as it was there. Seven separate trusts were involved. Counsel for the Commissioner contended that the power of revocation reserved by the settlor did not cease until his death, and hence that the latter event was the point at which the transfer actually took place. This Court sustained that contention with respect to two of the seven trusts. The ruling, however, was upon the distinct

ground that as to those two "there was reserved to the settlor *alone* a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him." But as to four of the other five trusts the power of revocation could not be exercised without the consent of the beneficiaries, and, as to the remaining trust, without the consent of *a majority* of the several beneficiaries; and it was held that none of those five trusts was includable in the decedent's gross estate, because of that vital difference between them and the two other trusts.

Manifestly, the whole point and philosophy of the decision were and are, that where a trust can be revoked only with the consent of the beneficiary the nominal power of revocation is thereby so neutralized and emasculated as, in contemplation of law and also as a practical matter, to be treated as non-existent. The principle, we submit, is as applicable and controlling here as it was held to be there; for if a qualifying clause in a provision purporting to reserve the right of revocation takes from the provision its essence and vitality as a revocatory stipulation, then necessarily the provision becomes unusable in *any* connection in which the existence of the power of revocation is essential.

But our opponents object that to construe sub-section (d) as not covering cases where the power of revocation hinges upon the consent of the beneficiary is to read into that subsection words which do not appear in it. Such is the customary formula of protest in every case in which a rigidly literal interpretation of the language of a statute is contended for, and had courts been alarmed at or deterred by the bugaboo many an absurd and unintended meaning would have been attributed to statutes and other writings. The very phrase here involved, "any person", has been construed many times. In some instances its import has been restricted within a narrower compass than a mere abstract consideration of the phrase alone would warrant, whilst in others its meaning has even been broadened and

made more comprehensive than the words, separated from their context and considered apart from the subject to which they happened to relate, would suggest. The cases are too numerous for individual review here. Besides, it would seem quite unnecessary, and we therefore simply cite *"Any Person"*, Volume 1 of the several series of *Words and Phrases.*

In accordance with the familiar yet cardinal rule, that it is the *intention* of the law-making body in the use of the words employed which must be ascertained and, if constitutional, given effect, we invite the Court, first of all, to a consideration of the underlying purpose of sub-section (d).

That purpose, we submit, is fairly plain from the provisions of Sections 301 and 302. By sub-section (a) of Section 301 a tax is imposed in general terms upon the net estate of every decedent dying after its enactment, such net estate to be ascertained as elsewhere in the statute prescribed. Then, by the opening paragraph of Section 302, it is provided how the value of the decedent's gross estate shall be determined. It is to be by including the value at the time of the decedent's death of all property *to the extent of his interest in it* as specified in sub-sections (a) to (g) of that section.

Evidently the object was to reach everything (1) which in simple, indisputable fact was, or (2) which in sound theory and contemplation of law could be treated as being, a part of the decedent's estate at the date of his death, *but nothing more. Heiner* v. *Donnan*, 285 U. S. 312, 322. And this latter, doubtless, because Congress recognized that it had no power under the Constitution to subject a decedent's estate to a tax upon the transfer of something which could not reasonably and fairly be said to be either actually or virtually a part of his estate when he died. Hence the qualifying words, "at the time of his death", in the first paragraph of Section 302, and the repeated use in the sub-sections of the limiting phrase, "To the extent."

When we come to consider sub-section (d) specifically, of course it must be read in the light of this general yet carefully defined purpose of the statute. So reading it, we respectfully submit that the words "any person" must of necessity be taken to mean any person whose consent to the revocation might with reason be counted on, else no ground whatever is left upon which to rest the theory that there remained in the decedent any property interest or power of revocation at all, and consequently, any that ceased with his death. Manifestly, therefore, as we submit, only upon the theory of a certain, or at least a highly probable, consent by the beneficiary to the revocation could the tax be upheld.

Now, this Court, taking the practical view of the matter, and doubtless considering that inasmuch as there is nothing unreal about a tax so likewise there should be nothing imaginary about the existence of the thing taxed, and having in mind human nature as it is respecting the voluntary surrender of economic benefits, in *Reinecke* v. *Northern Trust Co., supra,* concluded that a power of revocation conditioned upon the assent of the beneficiary is merely illusory.

And the soundness of that principle and its applicability here, we submit are both indubitable.

The Legislative History Confirms the Construction Here Advocated.

It is submitted, that the course of legislation shows, even to the point of demonstration, that the principle enunciated by this Court in *Reinecke* v. *Northern Trust Co., supra,* is fully concurred in by Congress, and that it meant Section 302 (d) to be construed in that sense. Singularly enough, we note in the brief of opposing counsel (p. 12) the proposition that the construction of Section 302 (d) for which *they* contend is supported by the legislative history. Since both sides cannot be right, the question is, Which is right?

Counsel quote the report of the Ways and Means Committee, but, as we read the excerpt, the last sentence in it confirms our contention, and quite definitely, and not theirs. Our reply, therefore, is somewhat in the nature of a demurrer. The sentence referred to reads:

> This provision [302(d)] is in accord with the principle of section 219(g) of the bill which taxes to the grantor the income of a revocable trust.

Section 219(g), in express terms, qualifies the phrase "any person" by adding the words "not a beneficiary of the trust"; so if, as stated in the committee report, Section 302(d), relating to the Estate Tax, was intended by Congress to accord with the principle of Section 219(a), relating to the Income Tax, then necessarily it must be read with the same qualification. Certanly 302(d) would be far out of accord with the principle of 219(g) were it not so read, and both would be completely out of accord with reality and the practical if they lacked the qualifying words, either express or implied.

In this connection Government counsel undertake to draw a distinction between a revocable trust as regards the Income Tax and a revocable trust as regards the Estate Tax, and to justify the presence of a restrictive statutory provision in the first and the absence of such a provision in the second. To us the argument appears shadowy and elusive, and we confess difficulty in following it. Of course there are points of difference between the two kinds of tax, but absolutely none, we respectfully submit, which would warrant any distinction so far as the feature now under discussion is concerned; and we therefore urge, particularly in the light of the report of the Committee, that Congress by that report made it plain beyond question that the two provisions were intended to have the same meaning.

And this view finds what we regard as additional convincing support in the further history of Section 302(d).

Three revenue acts have been passed by Congress since the decision in *Reinecke* v. *Northern Trust Co., supra,* was rendered, namely, those of 1932, 1934 and 1935, and yet in none of them was Section 302(d) changed so as to obviate the ruling in that case. Not only so, but reference to the Revenue Act of 1934 will disclose that although, by Section 401 of that Act, sub-section (d) of the Revenue Act of 1926 was amended in several particulars and substantially enlarged, the part of it involved in the present inquiry was left absolutely untouched. That part reads today just as it did when first it became law.

We submit that this highly significant fact precludes any other view than that Congress intended, and still intends, so far as that matter is concerned, that sub-section (d) be construed and administered in the light of this Court's decision in 1929 and in the light of the several other later decisions of lower appellate courts holding as to Section 302(d), itself, that it does not apply where the beneficiary's consent to the revocation must be obtained. Numerous authorities sustain this doctrine. Only four will be cited.

In *Reinecke* v. *Smith,* 289 U. S. 172, 175, this Court, in an opinion by Mr. Justice Roberts, said:

> "* * * the view held by those charged with the enforcement of the Act, *ratified by re-enactment of the section,* alike forbid the adoption of the construction for which the respondents contend."

In *Florida* v. *United States,* 292 U. S. 1, 6, this Court, by Mr. Chief Justice Hughes, expressed itself thus:

> The Congress had knowledge of the construction given Section 13(4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose.

Again, in *Hartley* v. *Commissioner*, 295 U. S. 216, 220, Mr. Justice Stone speaking for the Court, said:

> The re-enactment of the pertinent provisions of Section 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law.

Old Mission Company v. *Helvering*, 293 U. S. 289, 293-294, is to the same effect.

The point is further reinforced by the fact that, on the other hand, Congress has in a number of instances passed curative or similar amendments to Acts after courts had construed them in a certain way. One of these instances happens to be referred to by the Board of Tax Appeals in its opinion in this case, the Board stating that immediately following *per curiam* decisions by this Court in certain cases "Congress amended section 302 (a) of the Revenue Act of 1926 by joint resolution approved March 4, 1931, which specifically provides for the inclusion of property transferred in trust, etc." (R. 19)

Counsel cited *Porter* v. *Commissioner*, 288 U. S. 436, and *Dort* v. *Helvering*, 69 Fed. (2) 836, in support of their contention that the decision of this Court in *Reinecke* v. *Northern Trust Co., supra*, does not control here.

It is quite true that in the opinion in each of those cases, as counsel aver (p. 16), it was stated expressly that the *Reinecke Case* was "not in point", but just how that circumstance renders the case not in point in the controversy now before the Court, is not easy to see. However, a reading of the two cases cited makes it entirely clear why it was held that the ruling in the *Reinecke Case* did not apply in either of *them*. It was simply because in neither of them was the power to change dependent upon the consent or co-operation of the beneficiaries. Both the *Porter Case* and the *Dort Case* were cited by counsel for the petitioner

in the Court below. Moreover, the judge who wrote the opinion of that Court in the *Dort Case* also delivered the opinion in this case, and had no difficulty in distinguishing the latter from the former.

Section 302(d), if Construed and Applied as Contended for by Petitioner, Would Be Unconstitutional.

The trust here under consideration was created by an instrument executed in June, 1918. The Act in which the provisions of Section 302(d) first appeared was not passed until six years later, namely, the Revenue Act of 1924, which was approved June 2, 1924.

By the trust instrument the settlor, nine years prior to her death, divested herself entirely of legal title to the shares of stock, reserving only an equitable life interest in the dividends and the power by will to appoint a like interest. Hence, no part of the trust estate passed at the time of her death, with the possible exception, in a qualified sense, of the equitable life interest to which her surviving husband was appointed by her will. That interest is governed by sub-section (f) of Section 302 and plainly is not taxable, for the reason that the power of appointment reserved was a special and not a general one. All subsequent interests created by the instrument are distinctly of the character of limitations in remainder (*Leser* v. *Burnet*, 46 F. (2d) 756, 760), and all stem back to, and have their "generating source" in, the trust instrument and not in the decedent's death. *May* v. *Heiner*, 281 U. S. 238, 243.

In *Nichols* v. *Coolidge*, 274 U. S. 531, the Revenue Act of 1919 was involved. That Act in express words required the inclusion of transfers made prior to its passage. In holding it unconstitutional in that respect, this Court, in an opinion by Mr. Justice McReynolds, at pages 542-3, said:

> This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. [Citing cases] And we must conclude that Section 402(c)

> of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent *prior to its passage* merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. (Our italics)

Furthermore, if in enacting Section 302(d) Congress intended to cover a case of the kind here presented, that is to say, intended that substantial control over the stock should be deemed to have continued in the grantor up to the date of her death notwithstanding its transfer to the trustee, then we submit that Congress acted in a purely arbitrary and capricious way and in contravention of the Fifth Amendment. The statutory provision, so construed and applied, would, we submit, render it as unconstitutional as, in *Heiner* v. *Donnan*, 285 U. S. 312, sub-section (c) was held to be, on account of the conclusive presumption of testamentary intention prescribed in that sub-section.

Sub-section (f) of Section 302 Governs as to Respondent's Equitable Life Interest.

Apparently this question is not involved in the present review, though the record and course of the litigation leave it occupying a somewhat equivocal position and we therefore deem it advisable to deal with it very briefly.

Sub-section (f) of Section 302 of the Revenue Act of 1926, so far as pertinent here, reads:

> (f) To the extent of any property passing under a *general* power of appointment exercised by the decedent (1) by will, * * *.

The trust agreement provides that "No appointment hereunder shall be effective for a longer period than *the natural life* of the appointee" (R. 34), and the supplemental agreement of four days later says that appointments shall be made only to *natural* persons or to corpora-

tions or organizations created for charitable purposes. (R. 37)

It is clear that these restrictions render the power a special and limited one, inasmuch as Sections 232.05 and 232.06 of the *Wisconsin Statutes* define a general power as being one which authorizes an alienation "*in fee* • • • *to any alienee whatever,*" and a special power as being one which authorizes an alienation "of a *particular* estate or *interest less than a fee*". This is in accord with the common law. *Minor on Real Property,* Section 1319.

The above provisions of the statute apply to personal property also. *Cawker* v. *Dreutzer,* (Wis.) 221 N. W. 401, 413. See *Leser v. Burnet* (C. C. A. 4), 46 F. (2) 756, 758.

If, therefore, the equitable life interest of the respondent is to be included in the gross estate of the decedent, it must be, we submit, by virtue of sub-section (f), and by virtue of that sub-section only, since it is elementary in the law of statutory construction that the general provisions of a statute yield to provisions which deal specifically with one feature of the general subject to which the statute as a whole relates. It was definitely so held by this Court in *United States* v. *Chase,* 135 U. S. 255, 260. Further illustrations of the rule are to be found in *Caldwell* v. *Steinfeld* (C. C. A. 9) 294 F. 270, and *Old Dominion Land Co.* v. *United States* (C. C. A. 4), 296 F. 20.

Moreover, *Porter* v. *Commissioner,* 288 U. S. 436, which holds in effect that each of the sub-sections of Section 302 rests upon its own bottom, also would seem in point.

In consideration of all which, we submit it to be incontrovertible that as to the surviving husband's equitable life interest, at least, no estate tax is imposed.

This point was specifically presented by us before the Board of Tax Appeals, and was specifically sustained by that body. (R. 20-23) Our only reason for alluding to it here is the concluding paragraph of the opinion of the Court of Appeals in the case. That paragraph is as follows:

> The Board held, also, that the life interest in the income of the trust estate passing to respondent should not be included in the gross estate of decedent under sec. (f) of 302. The Board's holding was grounded on the fact that the reserved power of appointment was a special and not a general power. We have not considered the question on this appeal, for it is not raised by any of the assignments of error, nor was it argued or insisted on in brief or oral argument. (R. 45)

In the reasons assigned for not passing on the question, the learned Justice was, in part, mistaken. That is to say, the question was raised by the Commissioner's fourth assignment of error (R. 28). However, it was not included in the "Specification Of Errors To Be Urged", as set forth in the brief of his counsel, nor was it argued by such counsel either orally or by brief, except in a bare allusion to it in the oral reply to our own argument. The question is not presented by the petition for certiorari. We presume, therefore, that the matter stands, and will in any event continue to stand, where the determination of the Board of Tax Appeals placed it, namely, that as to the respondent's life interest, at least, no tax is due.

We do not anticipate an adverse decision by this Court on the broader question relating to sub-section (d). Far from it; but in the event of such a decision we ask that the Court indicate that it does not apply to the respondent's life interest.

Conclusion.

We submit that the decision of the Court of Appeals is, by every test, correct and that its judgment therefore should be affirmed.

Respectfully submitted,

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LOUIS QUARLES,
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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Waldemar R. Helmholz. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[November 11, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

This case, like No. 10, arises under Section 302 (d) of the Revenue Act of 1926. The respondent is administrator and sole beneficiary of the estate of his wife, Irene C. Helmholz. In 1918 she, her father and mother and her brothers and sisters joined in an indenture conveying to a trustee all of the shares of stock in the Patrick Cudahy Family Company. Her contribution was 999 shares, the dividends from which the trustee was to receive, and pay, less expenses, to Mrs. Helmholz for life, remainder to her appointee by will and remainder to her issue; and in event she or any other subscriber should die without issue the net dividends on the stock delivered to the trustee by such decedent were to be paid "to the surviving subscribers or their issue living at the time of distribution proportionately by right of represention."

The paragraph of the indenture relati e to the termination of the trust is:

"Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other

than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the dissolution of said the Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided."

Irene C. Helmholz left a will bequeathing all her property to respondent. The Supreme Court of Wisconsin held this a valid exercise of her power of appointment under the trust deed. The petitioner determined that the value of the 999 shares should be included in her gross estate. The Board of Tax Appeals reversed this determination.[1] The United States Court of Appeals for the District of Columbia, to which an appeal was taken pursuant to stipulation for hearing by that court, affirmed the Board.[2] We granted certiorari.

What is said in No. 10 shows that the transfer was complete when the trust was created in 1918. The features which differentiate this case are the absence of a reserved power of revocation or alteration and the retroactive operation of the Act. Either requires a decision that the corpus of the trust may not be included in the gross estate.

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[1] 28 B. T. A. 165.
[2] 75 F. (2d) 245.

The words of Section 302 (d) are, "where the enjoyment [of the transfer] was subject at the date of his death to any change *through the exercise of a power*, either by the decedent alone or in conjunction with any person, *to alter, amend or revoke* . . ." The agreement under consideration contains no such power as that described. Like every well drawn instrument it embodies provisions for the termination of the trust. An examination of paragraph Fifth shows that these were, in the main, such as any far-sighted settlor would employ. Since the beneficiaries were the issue of Patrick and Anna Cudahy it was natural to provide that upon the extinction of issue the trust should terminate and the principal be turned over to a secondary charitable trust. Inasmuch as the corpus comprised only the shares of a corporation there was nothing out of the ordinary in requiring that the trust terminate upon dissolution of the company and that the proceeds of liquidation be distributed amongst the then beneficiaries. It was not unnatural to direct that the trust should end if the managers of the company should unanimously so decide. And termination upon the death of the last surviving grandchild of Patrick and Anna Cudahy, they being then deceased, is certainly not unusual.

The petitioner, however, pitches upon the only remaining event of termination, asserting it to be the equivalent of a power to revoke, or to amend, to be exercised by the settlor with others. This is found in the clause providing that the delivery to the trustee of a writing signed by all the then beneficiaries (other than testamentary appointees) declaring such purpose, shall be effective to end the trust. He points out that such a writing might have been executed by Mrs. Helmholz and her co-beneficiaries while she was alive, with the effect of revesting in her the shares which she had delivered into the trust. This argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. The general rule is that all parties in interest may terminate the trust.[3] The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.

[3]Restatement of the Law of Trusts, §§ 337, 338. We are referred to no authority to the contrary in Wisconsin, the place of the transaction.

Another and more serious objection to the application of Section 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Company*, 278 U. S. 339. If Section 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531.

The judgment is

Affirmed.

Mr. Justice BRANDEIS, Mr. Justice STONE and Mr. Justice CARDOZO concur in the result on the ground last stated in the opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.